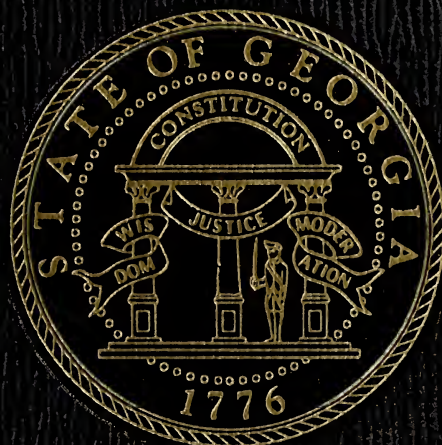


**OFFICIAL CODE
OF
GEORGIA
—
ANNOTATED**



VOLUME 4

Title 4. Animals

Title 5. Appeal and Error

Title 6. Aviation

1995 Edition



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OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission

The Office of Legislative Counsel

and

The Editorial Staff of the Michie Company



Published Under Authority of the State of Georgia

Volume 4 **1995 Edition**

Title 4. Animals

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Including Acts of the 1995 Session of the General Assembly
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the Georgia Appeals Reports Through
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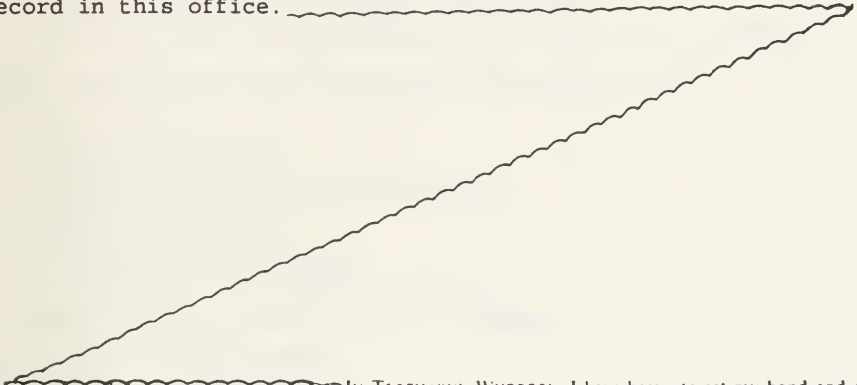
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State of Georgia



OFFICE OF SECRETARY OF STATE

I, Max Cleland, Secretary of State of the State of Georgia, do hereby certify that the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as the same appear of file and record in this office.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed

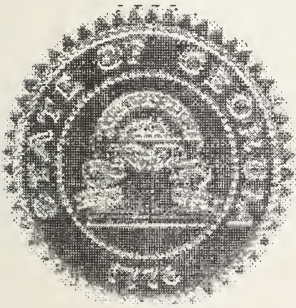
the seal of my office, at the Capitol, in the City of Atlanta, this

16th day of June, in the year of our Lord

One Thousand Nine Hundred and Ninety-five

and of the Independence of the United States of America the

Two Hundred and Nineteenth.



Max Cleland

SECRETARY OF STATE.

Preface

This volume cumulates and replaces the original edition of Volume 4 of the Official Code of Georgia Annotated, as supplemented by the 1994 Cumulative Supplement. The original edition of Volume 4 and its supplement may thus be recycled or, if so desired, may be retained for historical purposes only.

This volume contains all laws specifically codified in Titles 4 through 6 by the General Assembly through the 1995 Session. This volume also contains annotations to the following sources:

- Georgia Reports, volume 264, p. 817.
- Georgia Appeals Reports, volume 215, p. 649.
- Southeastern Reporter, Second Series, volume 451, p. 786.
- Federal Reporter, Third Series, volume 42, p. 646.
- Federal Supplement, volume 867, p. 1049.
- Federal Rules Decisions, volume 158, p. 512.
- Bankruptcy Reporter, volume 175, p. 791.
- Supreme Court Reporter, volume 115, p. 929.
- Lawyers' Edition, Second Series, volume 129, p. 903.
- United States Reports, volume 503, p. 954.
- Opinions of the Attorney General, No. 95-2 and No. U95-2.

Also included are references to the following sources:

- Emory Law Journal.
- Georgia Law Review.
- Georgia State University Law Review.
- Mercer Law Review.
- Georgia State Bar Journal.
- Georgia State University Law Review.
- American Jurisprudence, Second Edition.
- Corpus Juris Secundum.
- Uniform Laws Annotated.
- American Law Reports, First through Fifth Series.
- American Law Reports, Federal.

This volume retains amendment notes and effective date notes for Acts passed during the 1993, 1994 and 1995 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed during the 1982 through 1992 Sessions of the General Assembly, the user should consult the Georgia Laws.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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48. Revenue and Taxation.
49. Social Services.
50. State Government.
51. Torts.
52. Waters of the State, Ports, and Watercraft.
53. Wills, Trusts, and Administration of Estates.

In Addition, This Publication Includes

Constitution of the United States

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TITLE 4

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14. Sterilization of Dogs and Cats in Shelters, 4-14-1 through 4-14-5.

Cross references. — Criminal penalty for livestock theft, § 16-8-20. As to criminal penalty for removal of collars or identifying items or marks on animals, see § 16-9-71. As to cruelty to animals, see § 16-12-4. As to protection of endangered species of wildlife, see § 27-3-130 et seq. As to regulation of importation, sale, etc., of animals and birds

to be kept as pets, see § 31-12-9. As to control of rabies, see Ch. 19, T. 31. As to veterinarians and registered animal technicians generally, see Ch. 50, T. 43. As to liability of owner or keeper of vicious or dangerous animal for injuries caused by animal, see § 51-2-7.

OPINIONS OF THE ATTORNEY GENERAL

The duties of the Commissioner of Agriculture are not all included in Title 4 and

may be found in Titles 2, 10, 26, 43, and others. 1958-59 Op. Att'y Gen. p. 4.

CHAPTER 1

GENERAL PROVISIONS

Sec.		Sec.	
4-1-1.	Definitions.	4-1-4.	Presumption as to livestock killed or injured by poisons.
4-1-2.	State veterinarian — Qualifications; term of office; assistants.	4-1-5.	Use, possession, delivery, or sale of hog cholera vaccine, serum, or virus.
4-1-3.	State veterinarian — Duties generally.		

4-1-1. Definitions.

As used in this title, the term:

- (1) "Commissioner" means the Commissioner of Agriculture of the State of Georgia.
- (2) "Department" means the Department of Agriculture of the State of Georgia.

4-1-2. State veterinarian — Qualifications; term of office; assistants.

(a) The Commissioner is empowered to employ a licensed veterinarian, with not less than five years' practical experience in the general practice of his profession, as state veterinarian. The state veterinarian shall hold his office for the same term as the Commissioner unless removed sooner at the direction of the Commissioner.

(b) The Commissioner may employ such other assistants as may be necessary in carrying out the duties imposed on him by this title.

(c) The Commissioner shall have the power to prescribe the powers, duties, and functions of the state veterinarian and his assistants. (Ga. L. 1910, p. 125, §§ 1-3; Ga. L. 1929, p. 336, § 1; Ga. L. 1931, p. 7, § 97; Code 1933, §§ 62-902, 62-903; Ga. L. 1935, p. 167, §§ 3, 4; Ga. L. 1937, p. 850, §§ 1, 3; Ga. L. 1941, p. 238, §§ 2-4; Ga. L. 1995, p. 10, § 4.)

The 1995 amendment, effective February 21, 1995, part of an Act to correct errors and omissions in the Code, deleted "Code" preceding "title" in subsection (b).

Cross references. — License requirements for veterinarians, § 43-50-20 et seq.

Code Commission notes. — The title of the state veterinarian was changed to "chief veterinarian" pursuant to Ga. L. 1941, p. 238, § 2. However, the title was changed back to "state veterinarian" administratively and is so used in this Code section.

RESEARCH REFERENCES

Am. Jur. 2d. — 78 Am. Jur. 2d, Veterinarians, § 7.

4-1-3. State veterinarian — Duties generally.

The duties of the state veterinarian are to administer the business and affairs of the Animal Industry Division of the department. This includes enforcing the regulations and directing the programs designed to control and eradicate animal disease, directing the proper interstate movement of livestock, enforcing Article 3 of Chapter 2 of Title 26, the "Georgia Meat Inspection Act," promoting livestock marketing, and licensing and bonding livestock markets, dealers, and meat packers. (Ga. L. 1910, p. 125, § 2; Ga. L. 1931, p. 7, § 97; Code 1933, § 62-901; Ga. L. 1935, p. 167, §§ 2, 4; Ga. L. 1937, p. 850, § 2; Ga. L. 1941, p. 238, §§ 1, 4; Ga. L. 1984, p. 22, § 4.)

4-1-4. Presumption as to livestock killed or injured by poisons.

If livestock is killed or injured by poisoned crops or other poison on the property, there shall be a rebuttable presumption that the poisoning was done by the person in possession and charge of the property. (Orig. Code 1863, § 1403; Code 1868, § 1460; Code 1873, § 1447; Code 1882, § 1447; Civil Code 1895, § 1768; Civil Code 1910, § 2027; Code 1933, § 62-803.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 134, 151.

C.J.S. — 3A C.J.S., Animals, § 275.

ALR. — Scienter as condition of liability for damage by trespassing animals other than dogs, 33 ALR 1305.

Rights and remedies as to chattels cast upon riparian land, 41 ALR 1015.

Liability for injury to trespassing stock from poisonous substances on the premises, 12 ALR3d 1103.

4-1-5. Use, possession, delivery, or sale of hog cholera vaccine, serum, or virus.

(a) It shall be unlawful for any person, firm, partnership, corporation, or association or any agency, department, or other political subdivision of a state, county, or municipal government or other entity to use, possess, sell, offer or hold for sale, deliver, distribute, introduce, or deliver for introduction into commerce hog cholera vaccine, serum, or virus in this state. A violation of this subsection shall constitute a misdemeanor.

(b) The Commissioner shall seize and destroy any hog cholera vaccine, serum, or virus found in this state. (Code 1933, §§ 62-1201, 62-1202, enacted by Ga. L. 1977, p. 280, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 31-32.

C.J.S. — 3A C.J.S., Animals, § 72.

CHAPTER 2

MARKS AND BRANDS

Sec.		Sec.	
4-2-1.	Mark, brand, or tattoo registration — Certificates.	4-2-4.	Promulgation of rules and regulations.
4-2-2.	Mark, brand, or tattoo registration — Evidential value.	4-2-5.	Administration of chapter and rules and regulations.
4-2-3.	Mark, brand, or tattoo registration — Change.		

OPINIONS OF THE ATTORNEY GENERAL

There is no requirement in this chapter that livestock must be marked or branded before moving; however, if livestock is marked or branded, that brand should be registered as provided by law. 1958-59 Op. Att’y Gen. p. 10.

4-2-1. Mark, brand, or tattoo registration — Certificates.

(a) Any person owning any livestock, including any ratite, and desiring to register a mark, brand, or tattoo shall apply to the Commissioner for a certificate of mark, brand, or tattoo registration. Application for a certificate shall be made on forms provided by the department. Applications shall contain or be accompanied by such information as may be required by rule or regulation. In issuing certificates, the Commissioner shall not issue certificates to more than one person for the same or substantially identical marks, brands, or tattoos. There shall be no charge or fee for registration.

(b) Prior to July 1 of 1974 and on or before the same date every fifth year thereafter, the Commissioner shall purge from his lists of registrations the registrations of all marks, brands, or tattoos which the person to whom they are registered does not desire to retain as a registered mark, brand, or tattoo. Prior to removing a mark, brand, or tattoo from registration, the Commissioner shall, by registered or certified mail, notify the person to whom the mark, brand, or tattoo is registered that the registration will be canceled unless the Commissioner is notified within a period of three months from the date of mailing that such person desires to continue the registration of his mark, brand, or tattoo. If the Commissioner does not receive a reply within three months, he may cancel the registration of such mark, brand, or tattoo and may then reassign such mark, brand, or tattoo to any person seeking to register it, under such rules and regulations as may be prescribed by the Commissioner.

(c) It shall be the duty of the Commissioner to transmit a copy of any certificate of mark, brand, or tattoo registration to the judge of the probate court of the county of residence of the person to whom the certificate is

issued or to the judge of the probate court of the county in which the animals to be marked, branded, or tattooed are located if the owner thereof is not a resident of this state. The judge of the probate court may record the certificate in a book kept by him for that purpose.

(d) No provision of this chapter shall affect or impair the validity of any mark, brand, or tattoo registered or recorded in the office of the Commissioner prior to April 1, 1974. (Ga. L. 1953, Nov.-Dec. Sess., p. 175, § 2; Code 1933, § 62-102, enacted by Ga. L. 1974, p. 1003, § 1; Ga. L. 1995, p. 244, § 3.)

The 1995 amendment, effective April 7, 1995, inserted “, including any ratite,” in the first sentence in subsection (a).

OPINIONS OF THE ATTORNEY GENERAL

Methods of notification for registration and cancellation. — The Commissioner of Agriculture may utilize either of the two following methods to comply with this section: (1) mailing of registered notices to all names on the current registration list at least 90 days prior to the date set for cancellation of registered marks, brands or tattoos; or (2)

mailing of prenotice solicitations of intent to all registrants, to be followed by continuation of registration for those indicating affirmation of such action and by mailing of registered 90-day notices to those registrants not responding or responding negatively. 1974 Op. Att’y Gen. No. 74-87.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 8-9.

C.J.S. — 3A C.J.S., Animals, §§ 16, 18, 19, 20, 22.

4-2-2. Mark, brand, or tattoo registration — Evidential value.

The fact that any livestock is marked, branded, or tattooed with a registered mark or brand shall constitute prima-facie evidence in any trial or proceeding that such livestock belongs to the person to whom the certificate of mark, brand, or tattoo registration for that particular mark, brand, or tattoo was issued. This Code section shall not apply to livestock marked or branded prior to April 1, 1974, unless the mark, brand, or tattoo was registered or recorded in the office of the Commissioner. (Orig. Code 1863, § 1395; Code 1868, § 1452; Code 1873, § 1439; Code 1882, § 1439; Civil Code 1895, § 1758; Civil Code 1910, § 2017; Code 1933, § 62-104; Code 1933, § 62-103, enacted by Ga. L. 1974, p. 1003, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 8, 9.
C.J.S. — 3A C.J.S., Animals, § 18.

ALR. — Identification of animals involved in conversion action, 51 ALR2d 1154.

4-2-3. Mark, brand, or tattoo registration — Change.

No registered mark, brand, or tattoo shall be changed so as to be of any use to the owner, unless permission is first granted by the Commissioner and the change is recorded. (Orig. Code 1863, § 1398; Code 1868, § 1455; Code 1873, § 1442; Code 1882, § 1442; Civil Code 1895, § 1761; Civil Code 1910, § 2020; Code 1933, § 62-107; Code 1933, § 62-104, enacted by Ga. L. 1974, p. 1003, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, **C.J.S.** — 3A C.J.S., Animals, §§ 16, 18, 19.
§§ 8, 9.

4-2-4. Promulgation of rules and regulations.

The Commissioner is authorized to promulgate and adopt such rules and regulations as may be necessary or convenient to carry out this chapter. (Code 1933, § 62-105, enacted by Ga. L. 1974, p. 1003, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, **C.J.S.** — 3A C.J.S., Animals, § 19.
§ 9.

4-2-5. Administration of chapter and rules and regulations.

It shall be the duty of the Commissioner to administer this chapter and any rules and regulations adopted pursuant to this chapter. (Ga. L. 1953, Nov.-Dec. Sess., p. 175, § 3; Code 1933, § 62-101, enacted by Ga. L. 1974, p. 1003, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, **C.J.S.** — 3A C.J.S., Animals, §§ 16, 18.
§ 8.

CHAPTER 3

LIVESTOCK RUNNING AT LARGE OR STRAYING

Sec.		Sec.	
4-3-1.	Legislative intent.	4-3-8.	Return and disposition of proceeds of sale.
4-3-2.	Definitions.	4-3-9.	Care of impounded animals; employment of guards, poundmasters, or other persons.
4-3-3.	Permitting livestock to run at large or stray.	4-3-10.	Fees for impounding, serving notice, care and feeding, advertising, and disposing of impounded animals.
4-3-4.	Impoundment of livestock running at large or straying.	4-3-11.	County livestock pounds.
4-3-5.	Notice of impoundment and sale of livestock.	4-3-12.	Permitting livestock to run at large or stray; releasing impounded livestock; penalty.
4-3-6.	Redemption of livestock prior to sale.		
4-3-7.	Disposition of livestock not sold at auction.		

Cross references. — Duties and liability of railroad companies for livestock killed or injured by trains operated by such companies, § 46-8-210 et seq.

RESEARCH REFERENCES

ALR. — Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 132.

Liability of owner or operator of vehicle for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 159.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 29 ALR4th 431.

Liability for damage to motor vehicle or injury to person riding therein from collision with runaway horse, or horse left untended or untied in street, 49 ALR4th 653.

Liability for personal injury or death caused by trespassing or intruding livestock, 49 ALR4th 710.

Liability of governmental entity for damage to motor vehicle or injury to person riding therein resulting from collision between vehicle and domestic animal at large in street or highway, 52 ALR4th 1200.

4-3-1. Legislative intent.

There is found and declared a necessity for a uniform state-wide livestock law embracing all public roads in the state and all other property. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 1; Ga. L. 1955, p. 633, § 1.)

JUDICIAL DECISIONS

Cited in Tennessee, Ala. & Ga. Ry. v. Andrews, 117 Ga. App. 164, 159 S.E.2d 460 (1968).

4-3-2. Definitions.

As used in this chapter, the term:

(1) "Livestock" means all animals of the equine, bovine, or swine class, including goats, sheep, mules, horses, hogs, cattle, and other grazing animals, and all ratites, including, but not limited to, ostriches, emus, and rheas.

(2) "Owner" means any person, association, firm, or corporation, natural or artificial, owning, having custody of, or in charge of livestock.

(3) "Public roads" means any street, road, highway, or way, including the full width of the right of way, which is open to the use of the public for vehicular travel.

(4) "Running at large" or "straying" means any livestock which is not under manual control of a person and which is on any public roads of this state or on any property not belonging to the owner of the livestock, unless by permission of the owner of such property. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 2; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 2; Ga. L. 1995, p. 244, § 4.)

The 1995 amendment, effective April 7, 1995, added ", and all ratites, including, but not limited to, ostriches, emus, and rheas" at the end of paragraph (1).

JUDICIAL DECISIONS

"Owner" construed. — Landowner who allowed her cousin to keep his cattle on her property, provided he maintained the fence around the property, did not come within the statutory definition of an "owner." *Evancho v. Baker*, 196 Ga. App. 903, 397 S.E.2d 166 (1990).

4-3-3. Permitting livestock to run at large or stray.

No owner shall permit livestock to run at large on or to stray upon the public roads of this state or any property not belonging to the owner of the livestock, except by permission of the owner of such property. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 3; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 4.)

Law reviews. — For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

JUDICIAL DECISIONS

Inference of owner's negligence from livestock running at large. — The mere fact that livestock is running at large permits an inference that the owner is negligent in permitting the livestock to stray; but when the owner introduces evidence that he has exercised ordinary care in the maintenance of the stock, that permissible inference disappears. *Green v. Heard Milling Co.*, 119 Ga. App. 116, 166 S.E.2d 408 (1969); *Wilkins v. Beverly*, 124 Ga. App. 842, 186 S.E.2d 436 (1971).

Negligence per se. — Where an owner through his negligence permits his livestock to stray or run at large upon the public highways of this state, he is not guilty of negligence per se. *Porier v. Spivey*, 97 Ga. App. 209, 102 S.E.2d 706 (1958) (decided under former Code 1933, § 62-601).

Liability for injury to livestock running at large. — Livestock running at large on a public road are trespassers, and a motorist is liable only for willful and wanton negligence in injuring the animal. *Green v. Heard Milling Co.*, 119 Ga. App. 116, 166 S.E.2d 408 (1969).

Since the abolition of the open range by adoption of this section, loose livestock going upon the lands of others, including a railroad right-of-way, are trespassers, and the duty owed them by the landowner or the railroad company is not willfully or wantonly to injure them. *Tennessee, Ala. & Ga. Ry. v. Andrews*, 117 Ga. App. 164, 159 S.E.2d 460 (1968).

Testimony as to defendant's care in maintaining his pasture fence does not demand a verdict in his favor. *Green v. Heard Milling Co.*, 119 Ga. App. 116, 166 S.E.2d 408 (1969).

Charging that violation of section is negligence per se. — Charging jury to the effect that a violation of this section is negligence per se was reversible error. *Lovell v. Howard*, 182 Ga. App. 891, 357 S.E.2d 600 (1987).

Cited in *Law v. Hulsey*, 109 Ga. App. 379, 136 S.E.2d 161 (1964); *Jackson v. State*, 120 Ga. App. 417, 170 S.E.2d 751 (1969); *Binford v. Bush*, 125 Ga. App. 704, 188 S.E.2d 883 (1972); *Caldwell v. Hunnicutt*, 159 Ga. App. 102, 282 S.E.2d 665 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Prohibition against free ranging of cattle. — The result of the prohibition of this

section is the prohibiting of the free ranging of cattle. 1960-61 Op. Att'y Gen. p. 3.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 40-42.

C.J.S. — 3A C.J.S., Animals, §§ 137-139.

ALR. — Liability of interurban railroad for killing or injuring livestock running at large, 2 ALR 98; 25 ALR 1506.

Liability for trespass or damage by fowls, 14 ALR 745.

Liability of agister to owner for damages from escape of animals, 23 ALR 265.

Presumption and burden of proof in agistment cases, 23 ALR 276.

Liability for injury to trespassing stock from poisonous substances or other conditions on the premises, 33 ALR 448.

Scienter as condition of liability for damage by trespassing animals other than dogs, 33 ALR 1305.

Rights and remedies as to chattels cast upon riparian land, 41 ALR 1015.

What constitutes willful trespass by stock on land not inclosed by legal fence, 158 ALR 375.

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Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 132.

Liability of owner or operator of vehicle for damage to motor vehicle or injury to person riding therein resulting from colli-

sion with domestic animal at large in street or highway, 21 ALR4th 159.

Liability of owner of animal for damage to motor vehicle or injury to person riding

therein resulting from collision with domestic animal at large in street or highway, 29 ALR4th 431.

4-3-4. Impoundment of livestock running at large or straying.

(a) It shall be the duty of the sheriff, his deputies, or any other county law enforcement officer to impound livestock found to be running at large or straying. Owners or operators of farms may also impound such livestock, provided that the livestock is kept in a suitable place and cared for properly; such owners or operators shall receive the feed and care fee allowed in Code Section 4-3-10.

(b) If an owner or operator of a farm impounds livestock, it shall be his duty to notify the owner of such livestock immediately. If the owner of the livestock is unknown and is not determined within three days, the person who impounds the livestock shall notify the sheriff of such impoundment; and the sheriff shall transport the livestock as soon as possible to a county pound as provided for in Code Section 4-3-11. The sheriff shall then follow the procedure set out in this chapter as if he had originally impounded such livestock. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 4; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 5.)

JUDICIAL DECISIONS

Cited in *Jackson v. State*, 120 Ga. App. 417, 170 S.E.2d 751 (1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 43-48.

C.J.S. — 3A C.J.S., Animals, §§ 123 et seq., 159-166.

4-3-5. Notice of impoundment and sale of livestock.

(a) Upon the impounding of any livestock by the sheriff, his deputies, or any other law enforcement officers of the county, the sheriff shall forthwith serve written notice upon the owner, advising such owner of the location or place where the livestock is being held and impounded, the amount due as a result of such impounding, and that unless such livestock is redeemed within three days from that date the livestock shall be offered for sale. In the event the owner of such livestock is unknown or cannot be found, service upon the owner shall be obtained by publishing a notice once in a newspaper of general circulation where the livestock is impounded, Sundays and holidays excluded. If there is no such newspaper then service shall be obtained by posting the notice at the courthouse door and at two other conspicuous places within said county. Such notice shall be in substantially the following form:

“To Whom It May Concern:

You are hereby notified that the following described livestock (giving full and accurate description of same, including marks and brands) is now impounded at (giving location where livestock is impounded) and the amount due by reason of such impounding is _____ dollars. The above-described livestock will, unless redeemed within three days from the date of this notice, be offered for sale at public auction to the highest bidder for cash.

Date Sheriff of _____ County, Georgia”

(b) Unless the impounded livestock is redeemed within three days from the date of the notice, the sheriff shall forthwith give notice of sale thereof, which shall be held not less than five days nor more than ten days, excluding Sundays and holidays, from the first publication of the notice of sale. The notice of sale shall be published in a newspaper of general circulation in the county where the livestock is impounded, excluding Sundays and holidays, and by posting a copy of such notice at the courthouse door. If there is no such newspaper, then notice shall be given by posting a copy at the courthouse door and at two other conspicuous places in the county. Such notice of sale shall be in substantially the following form:

“(Name of owner, if known, otherwise, ‘To Whom It May Concern’), you are hereby notified that I will offer for sale and sell at public sale to the highest bidder for cash the following described livestock (giving full and accurate description of each head of livestock) at _____ M. (the hours of sale to be between 11:00 A.M. and 2:00 P.M. eastern standard time or eastern daylight time, whichever is applicable) on the _____ day of _____ at the following place _____ (which place shall be where the livestock is impounded or at the place provided by the county commissioners for the taking up and keeping of such livestock) to satisfy a claim in the sum of _____ for fees, expenses for feeding and care, and costs hereof.

Date Sheriff of _____ County, Georgia”

(Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 5.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 43-48. C.J.S. — 3A C.J.S., Animals, §§ 126, 130, 159-165.

4-3-6. Redemption of livestock prior to sale.

The owner of any impounded livestock shall have the right at any time before sale thereof to redeem the livestock by paying to the sheriff all impounding expenses, including fees, keeping charges, and advertising or other costs incurred, which sum shall be deposited by the sheriff with the clerk of the superior court who shall pay all fees and costs as allowed in Code Section 4-3-10. In the event there is a dispute as to the amount of such costs and expenses, the owner may provide bond, with sufficient sureties to be approved by the sheriff, in an amount to be determined by the sheriff, but not exceeding the fair cash value of such livestock, conditioned to pay such costs and damages. Within ten days thereafter the owner shall institute an action to have the dispute adjudicated by the court or referred to a jury if requested by either party to the action. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 11.)

JUDICIAL DECISIONS

Recovery by possessory warrant. — Where a mule owned by two persons, which by an agreement between the owners is in the possession of one of them, escapes and trespasses upon the land of the other person, the latter person acquires lawful possession of the mule by impounding him for a trespass and the other person cannot recover the mule by possessory warrant. *Weatherby v. Gentry*, 50 Ga. App. 618, 179 S.E. 170 (1935) (decided under former Code 1933, § 62-603).

Trover action. — If the jury finds that impounding of bull yearling was legal, and that the defendant had not held the animal beyond a reasonable time before instituting the required proceedings, the plaintiff could not prevail in trover suit because there would have been no conversion at the time of the filing of the trover action. *Hall v. Browning*, 71 Ga. App. 194, 30 S.E.2d 345 (1944) (decided under former Code 1933, § 62-603).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 43, 44, 45, 48.

C.J.S. — 3A C.J.S., Animals, §§ 131, 132, 159 et seq.

4-3-7. Disposition of livestock not sold at auction.

If there is no bidder for the livestock at the sale provided for in Code Section 4-3-5, the sheriff shall have the livestock killed and shall dispose of the carcass thereof; and, if there is any money received by him from the disposal, the same shall be disbursed in the manner provided for in Code Section 4-3-8. If there is no ready sale for the carcass, the sheriff shall deliver the carcass to a public institution of the county, state, or municipality within the county or to any private charitable institution, in this order, according to their needs. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 7.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 43, 44, 45, 48. **C.J.S.** — 3A C.J.S., Animals, § 159 et seq.

4-3-8. Return and disposition of proceeds of sale.

(a) The sheriff, upon making a sale or other disposal as provided for in this chapter, shall forthwith make a written return thereof to the clerk of the superior court of such county, with a full and accurate description of the livestock sold or disposed of by him, to whom, and the sale price thereof, which report shall be filed by the clerk.

(b) At the time of making his return, the sheriff shall pay over to the clerk of the superior court the entire proceeds of the sale. The clerk of the superior court shall pay all costs and fees allowed in Code Section 4-3-10. If there is any balance remaining it shall be paid to the owner of such livestock, provided that the owner shall provide satisfactory proof of ownership to the board of county commissioners within 90 days from the date the sheriff reports the sale. If proof of ownership is not made within 90 days from the date the sheriff reports the sale, the clerk shall pay such proceeds into the fine and forfeiture fund of the county. The clerk shall keep a permanent record of all sales, disbursements, and distributions made under this chapter. If the amount realized from the sale or other disposition of the animal is insufficient to pay all fees, costs, and expenses as provided for in Code Section 4-3-10, the deficit shall be paid by the county from its fine and forfeiture fund. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 8.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 43, 44, 45, 48. **C.J.S.** — 3A C.J.S., Animals, §§ 129, 130, 159 et seq.

4-3-9. Care of impounded animals; employment of guards, poundmasters, or other persons.

The sheriff shall have feed and water provided for impounded livestock not less than twice a day and shall see that all milk cows and milk goats are milked twice a day. The sheriff shall employ poundmasters, guards, or other persons as are necessary to protect, feed, care for, and have custody of the impounded animals. The sheriff shall be entitled to the fees allowed in Code Section 4-3-10 for such feed and care. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 10.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 48.
C.J.S. — 3A C.J.S., Animals, §§ 138, 333.

ALR. — Liability for injury to trespassing stock from poisonous substances or other conditions on the premises, 33 ALR 448.

4-3-10. Fees for impounding, serving notice, care and feeding, advertising, and disposing of impounded animals.

The fees allowed for impounding, serving notice, care and feeding, advertising, and disposing of impounded animals shall be as follows:

(1) For impounding each animal, the sum of \$10.00 and mileage as provided by law for the arrest and commitment of prisoners;

(2) For serving any notice and making return thereon, the sum of \$7.50 and mileage provided by law for executing writs in actions at law and making return upon the same;

(3) For feed and care of impounded animals, the sum of \$5.00 per day per animal;

(4) For advertising or posting notices of sale of impounded animals, the same as provided by law for advertising property for sale under process;

(5) For sale or other disposition of impounded animals, the sum of \$5.00; and

(6) For report of sale of impounded animals, the sum of \$2.50. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 6; Ga. L. 1988, p. 325, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 44.
C.J.S. — 3A C.J.S., Animals, §§ 162, 163.

ALR. — Implied agreement to pay for pasturage by owner of livestock which enters on another's land, 39 ALR 857.

4-3-11. County livestock pounds.

(a) The county commissioners of the several counties of Georgia shall establish and maintain pounds or suitable places for the keeping of any livestock taken up and impounded under this chapter until the same is sold, redeemed, or otherwise disposed of. In any case, the county commissioners shall provide truck transportation for the impounded animals.

(b) In those counties having no county commissioners, the judge of the probate court or other governing authority shall perform any functions or duties required of county commissioners under this chapter. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 9; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 43, 44, 57. **C.J.S.** — 3A C.J.S., Animals, §§ 333-335.

4-3-12. Permitting livestock to run at large or stray; releasing impounded livestock; penalty.

Any owner of livestock who intentionally or knowingly permits the same to run at large or stray upon the public roads of this state or any property not belonging to the owner of the livestock unless by permission of the owner of such property, or any person who shall release livestock, after being impounded, without authority of the impounder, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding \$500.00, or by both fine and imprisonment. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 12; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 6.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 40 et seq.

C.J.S. — 3A C.J.S., Animals, § 169.

ALR. — Scienter as condition of liability for damage by trespassing animals other than dogs, 33 ALR 1305.

Owner's liability, under legislation forbidding domestic animals to run at large on

highways, as dependent on negligence, 34 ALR2d 1285.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 29 ALR4th 431.

ANIMALS

CHAPTER 4

PREVENTION AND CONTROL OF DISEASE IN LIVESTOCK

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CONTROL OF DISEASE IN LIVESTOCK

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4-4-146.	Indemnification for condemned swine — Release required.	4-4-150.		Conduct of scientific research.
4-4-147.	Elimination of disease at farm of origin.	4-4-151.		Injunctions.

Administrative rules and regulations. — Rules of Georgia Department of Agriculture, Contagious diseases, Official Compilation of Chapter 40-13-8.
Rules and Regulations of State of Georgia,

RESEARCH REFERENCES

ALR. — Constitutionality of statute for control of diseases of livestock, 65 ALR 525.

ARTICLE 1

CONTROL OF INFECTIOUS OR CONTAGIOUS DISEASES IN LIVESTOCK

PART 1

GENERAL PROVISIONS

Cross references. — Use of sulfanilamide and sulfonamide drugs for control of livestock and poultry diseases, § 26-4-6.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **ALR.** — Constitutionality of statute for control of diseases of livestock, 65 ALR 525.
C.J.S. — 3A C.J.S., Animals, § 67 et seq.

4-4-1. Legislative intent.

Because of the existing and increasing possibility of the occurrences of highly contagious or infectious diseases which threaten to destroy the livestock of this state and because certain known agents and vectors are instrumental in the spread of certain highly contagious or infectious diseases in livestock, it is found and declared to be necessary to:

- (1) Regulate the feeding of garbage;
- (2) Regulate the rendering of the carcasses of dead domestic animals;

(3) Protect areas of this state free of disease by quarantine against the introduction of such diseases;

(4) Quarantine infected areas against the spread of such diseases therefrom; and

(5) Undertake to eradicate, control, suppress, and prevent such contagious or infectious diseases and make provisions therefor. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 1.)

44-1.1. "Livestock" defined.

As used in this chapter, the term "livestock" means cattle, swine, equines, poultry, sheep, goats, ratites, and ruminants. (Code 1981, § 4-4-1.1, enacted by Ga. L. 1986, p. 425, § 1; Ga. L. 1995, p. 244, § 5.)

The 1995 amendment, effective April 7, 1995, inserted "ratites,".

44-2. Promulgation of rules and regulations.

The Commissioner of Agriculture is authorized to promulgate rules and regulations as may be necessary to effectuate the purpose of this article. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 4.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, C.J.S. — 3A C.J.S., Animals, §§ 66, 67.
§ 32.

44-3. Injunctions.

In addition to the remedies provided in this article and notwithstanding the existence of any adequate remedy at law, the Commissioner is authorized to apply to the superior court for an injunction. Such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of this article or for failing or refusing to comply with the requirements of this article or any rule or regulation adopted by the Commissioner thereunder. An injunction issued under this Code section shall not require a bond. (Ga. L. 1956, p. 627, § 1.)

44-4. Administrative hearings and penalties.

(a) The Commissioner, in order to enforce this article or any orders, rules, or regulations promulgated pursuant thereto, may issue an administrative order imposing a penalty not to exceed \$1,000.00 for each violation whenever the Commissioner, after a hearing, determines that any person

has violated any provision of this article or any quarantines, orders, rules, or regulations promulgated thereunder.

(b) The initial hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by any final order or action of the Commissioner shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50. All penalties recovered by the Commissioner as provided for in this article shall be paid into the state treasury. The Commissioner may file in the superior court wherein the person under order resides or, if said person is a corporation, in the county wherein the corporation maintains its principal place of business or in the county wherein the violation occurred a certified copy of a final order of the Commissioner unappealed from or of a final order of the department affirmed upon appeal, whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in an action duly heard and determined by said court. The penalty prescribed in this Code section shall be concurrent, alternative, or cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the Commissioner with respect to any violation of this article and any quarantines, orders, rules, or regulations promulgated pursuant thereto. (Ga. L. 1979, p. 1035, § 1; Ga. L. 1982, p. 3, § 4.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, § 32 et seq. C.J.S. — 3A C.J.S., Animals, § 67 et seq.

4-4-5. Enforcement of chapter.

(a) The Commissioner is vested with police powers to enforce this chapter and the rules and regulations adopted pursuant to this chapter.

(b) The Commissioner is authorized to employ, designate, deputize, and delegate to employees of the department the necessary authority to enforce this chapter and the rules and regulations adopted pursuant to this chapter. Employees who have been so designated by the Commissioner and who have been certified by the Georgia Peace Officer Standards and Training Council as having successfully completed the course of training required by Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act," are authorized:

- (1) To carry firearms authorized or issued by the Commissioner while in the performance of their duties;
- (2) To inspect any livestock found within this state;

(3) To stop and inspect any vehicle transporting livestock in this state;

(4) To inspect and require the production of health certificates, waybills, permits, or other documents required by federal or state laws, rules, regulations, or orders for the transportation of livestock; and

(5) To arrest any person found to be in violation of this chapter.

(c) From funds appropriated or available to the department, the Commissioner is authorized to provide motor vehicles, uniforms, firearms, and any other equipment and supplies needed by employees of the department to carry out this chapter.

(d) This Code section shall not repeal, supersede, alter, or affect the power of any other law enforcement officer of this state or of any county, municipality, or other political subdivision of this state to enforce this chapter. At the request of the Commissioner of Agriculture, it shall be the duty of all state, county, municipal, and other law enforcement officers in this state to enforce and to assist the Commissioner and the employees and agents of the department in the enforcement of this chapter. (Code 1981, § 4-4-5, enacted by Ga. L. 1986, p. 425, § 2; Ga. L. 1990, p. 572, § 1.)

PART 2

FEEDING GARBAGE TO ANIMALS

4-4-20. "Garbage" defined.

The term "garbage," as used in this part, except as otherwise provided in this part, means all refuse matter, animal or vegetable; by-products of a restaurant, kitchen, or slaughterhouse; and every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise. This term includes the word "swill" as commonly used. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 6; Ga. L. 1971, p. 60, § 4.)

4-4-21. Feeding garbage to animals generally.

Except as otherwise provided in this part, it shall be unlawful for any person to feed garbage to animals; provided, however, that an individual may feed garbage to his own animals if he feeds them only with garbage from his own household. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32.

C.J.S. — 3A C.J.S., Animals, §§ 66, 67. 66 C.J.S., Nuisance, § 49.

4-4-22. Feeding garbage to swine.

(a) As used in this Code section, the term:

(1) "Garbage" means any refuse matter or by-product which contains animal tissue or which has been mixed with any animal tissue, whether liquid or otherwise.

(2) "Person" means any individual, firm, partnership, corporation, or association or any agency, department, or other political subdivision of the state or any other entity.

(b) It shall be unlawful for any person to feed garbage to swine or to place garbage in such a position or location as to permit its consumption by swine, except as otherwise provided in this Code section. Persons who negligently or intentionally provide garbage or sources of garbage to other persons found to be feeding garbage to swine in violation of this part shall be deemed culpable and responsible for the violative acts of feeding as if they were the actual feeders of the garbage.

(c) This Code section shall not apply to any person who:

(1) Raises swine solely for slaughter and consumption on the farm or property on which the swine are raised;

(2) Does not purchase and import or permit the importation onto such farm or property on which swine are raised any swine, portion of the carcass of any swine, pork food product, or garbage containing any animal tissue, whether liquid or otherwise; and

(3) Does not sell, trade, exchange, export, or otherwise dispose of any swine, portion of the carcass of any swine, pork food product, or any garbage or refuse containing any portion thereof outside of such farm or property on which the swine are raised.

(d) Any person who violates any provision of this Code section shall be guilty of a misdemeanor. Each day in which such violation occurs shall constitute a separate offense. (Ga. L. 1971, p. 60, § 1; Ga. L. 1977, p. 225, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32. C.J.S. — 3A C.J.S., Animals, §§ 66, 67.

4-4-23. Licensing of garbage feeders.

No person shall feed garbage to swine without first applying for and obtaining a license from the Commissioner. There shall be no fee for such license, and it shall be valid until and unless revoked or canceled. The requirement of obtaining a license shall not apply to an individual feeding

his own animals garbage from his own household. No license which will permit the feeding of any garbage, as that term is defined in subsection (a) of Code Section 4-4-22, to swine shall be issued to any person who does not meet the qualifications of subsection (c) of Code Section 4-4-22. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 3; Ga. L. 1960, p. 939, § 1; Ga. L. 1971, p. 60, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32.

C.J.S. — 3A C.J.S., Animals, §§ 66, 67.

ALR. — Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

4-4-24. Cancellation, suspension, or revocation of licenses.

Every licensed feeder of garbage who violates this part or the rules and regulations promulgated by the Commissioner pursuant thereto shall have his license revoked, canceled, or suspended, upon a notice and hearing. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 5.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32.

C.J.S. — 3A C.J.S., Animals, §§ 66, 67.

4-4-25. Administrative remedies.

Any person affected by this part or by any rule or regulation adopted pursuant thereto shall have and shall be required to exhaust the administrative remedies provided by Code Section 4-6-8. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 7.)

4-4-26. Penalty for violations of part or rules or regulations promulgated thereunder.

Any person, firm, partnership, or corporation which violates any provision of this part or any rule or regulation made pursuant thereto shall be guilty of a misdemeanor. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 8; Ga. L. 1956, p. 85, § 1.)

PART 3

RENDERING AND DISPOSAL PLANTS

Cross references. — Regulation of business of buying, selling, or transporting dead, dying, or disabled animals or the carcasses of such animals generally, § 26-2-130 et seq.

Administrative rules and regulations. — Meat inspection and meat processing, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Depart-

ment of Agriculture, Chapter 40-10. Slaughtering requirements, Official Compilation of Rules and Regulations of State of Georgia,

Rules of Georgia Department of Agriculture, Chapter 40-13-6.

4-4-40. Definitions.

As used in this part, the term:

- (1) "Carcasses of domestic animals" means all or any part or portions of any dead domestic animal not slaughtered for human consumption.
- (2) "Collection center" means any approved facility where carcasses of domestic animals from state or federally licensed facilities are collected for loading into approved vehicles for delivery to a rendering plant.
- (3) "Rendering plant" means a place of business or location or plant where the carcasses of domestic animals or packing house refuse or other refuse is purchased, received, or unloaded and where such carcasses or refuse is processed for the purpose of obtaining the hide, skin, grease, residue, or any other by-product from such animals or refuse in any way whatsoever. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 9; Ga. L. 1989, p. 1414, § 1.)

JUDICIAL DECISIONS

Cited in Bagwell & Steward, Inc. v. Bennett, 214 Ga. 780, 107 S.E.2d 824 (1959).

4-4-41. Licenses required; expiration; fee.

It shall be unlawful for any person, firm, partnership, or corporation to engage in the business of operating a rendering plant without first applying for and obtaining a license from the Commissioner of Agriculture. Each license shall expire on December 31 of each year, and each application for a license must be accompanied by a license fee of \$5.00. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 12; Ga. L. 1989, p. 1414, § 1.)

JUDICIAL DECISIONS

Cited in Bagwell & Steward, Inc. v. Bennett, 214 Ga. 780, 107 S.E.2d 824 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32. C.J.S. — 3A C.J.S., Animals, §§ 66, 67.

4-4-42. Revocation, cancellation, or suspension of licenses.

Every licensed rendering plant which violates the laws of this state or the rules and regulations promulgated by the Commissioner pursuant thereto

shall have its license revoked, canceled, or suspended upon a notice and hearing. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 14; Ga. L. 1989, p. 1414, § 1.)

JUDICIAL DECISIONS

Cited in Bagwell & Steward, Inc. v. Bennett, 214 Ga. 780, 107 S.E.2d 824 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32. **C.J.S.** — 3A C.J.S., Animals, §§ 66, 67.

44-43. Rendering plant requirements.

(a) It shall be unlawful for any person, firm, partnership, or corporation to operate a rendering plant unless the rendering plant:

(1) Is constructed according to blueprints approved by the Georgia Department of Agriculture; provided, however, that neither blueprints for nor alterations to facilities existing on July 1, 1989, shall be required except to the extent that alterations are necessary for compliance with the other provisions of this part, and to the extent that alterations are necessary for such compliance they shall be made not later than July 1, 1990;

(2) Has walls, floors, and ceilings of concrete or other impervious materials;

(3) Has ample hot water (140 degrees Fahrenheit) to facilitate cleaning of the building, equipment, and vehicles used to move products;

(4) Has adequate drainage constructed and maintained so that no liquid or other matter is permitted to escape therefrom unless into a sewage facility approved by the governmental authority having proper jurisdiction. The document showing approval of such sewage facility must be maintained at the plant for inspection review; and

(5) Is cleaned and sanitized daily to prevent odor and the accumulation of refuse.

(b) It shall be unlawful for any person, firm, partnership, or corporation to operate a rendering plant unless all vehicles used in the transportation of carcasses or refuse on public highways are of such construction as to prevent seepage or residue from escaping.

(c) Carcasses or refuse shall not be allowed to accumulate or be held for any period of time at any place other than a licensed slaughtering, processing, or rendering plant or any combination thereof. Such licensed

facilities shall have a procedure approved by the department if they accumulate or hold carcasses or refuse for longer than one day's operation.

(d) Rodent and vermin control shall be diligently practiced with buildings and surrounding grounds kept clean and free of refuse, trash, and manure.

(e) All barrels used for transportation and storage of carcasses or refuse shall be clearly marked "INEDIBLE" with letters not less than two inches in height. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 10; Ga. L. 1989, p. 1414, § 1.)

Code Commission notes. — Pursuant to the first sentence of subsection (c) of this Code Section 28-9-5, in 1989, a comma was Code section.
deleted following "plant" near the end of

JUDICIAL DECISIONS

Cited in *Bagwell & Steward, Inc. v. Bennett*, 214 Ga. 780, 107 S.E.2d 824 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32. **C.J.S.** — 3A C.J.S., Animals, §§ 66, 67.

4-4-44. Collection center requirements.

(a) It shall be unlawful for any person, firm, partnership, or corporation to operate a collection center until it has applied for and obtained a written permit from the Commissioner to carry on such an operation.

(b) A collection center shall be located on a site in compliance with local zoning ordinances and shall have a sewage facility approved by the governmental authority having proper jurisdiction.

(c) A collection center shall be covered by a metal roof or other permanent type covering with sufficient screened ventilators to allow air flow yet prevent the entry of rodents, birds, and insects.

(d) A collection center shall have adequate drains in an impervious floor with adequate hot water (140 degrees Fahrenheit) to clean thoroughly the collection center premises.

(e) A collection center shall be cleaned and sanitized daily.

(f) The management of a collection center shall agree to hold inedible materials no longer than 24 hours.

(g) With respect to any requirements of subsections (a) through (d) of this Code section which relate solely to the physical construction or alteration of a collection center, the collection center operator shall have

until July 1, 1990, to comply with such requirements. (Code 1981, § 4-4-44, enacted by Ga. L. 1989, p. 1414, § 1.)

Editor's notes. — Former Code Section 4-4-44 has been redesignated as Code Section 4-4-45 by Ga. L. 1989, p. 1414, § 1.

JUDICIAL DECISIONS

Cited in *Bagwell & Steward, Inc. v. Bennett*, 214 Ga. 780, 107 S.E.2d 824 (1959).

RESEARCH REFERENCES

<p>Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32.</p> <p>C.J.S. — 3A C.J.S., Animals, §§ 66, 67.</p> <p>ALR. — Liability of owner or occupant of</p>	<p>premises to building or construction inspector coming upon premises in discharge of duty, 28 ALR3d 891.</p>
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4-4-45. Inspections; maintenance of records; maintenance of vehicles.

Every rendering plant shall be subject at all times to inspection by the Commissioner. Each such rendering plant shall keep and furnish the Commissioner such information as he may by rule or regulation require concerning the collection, transportation, distribution, and processing of the carcasses of dead domestic animals or packing house refuse and, further, shall keep and maintain sanitary at all times its vehicles used in the collection, transportation, and distribution of dead domestic animals and packing house refuse. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 13; Code 1981, § 4-4-44; Code 1981, § 4-4-45, as redesignated by Ga. L. 1989, p. 1414, § 1.)

JUDICIAL DECISIONS

Cited in *Bagwell & Steward, Inc. v. Bennett*, 214 Ga. 780, 107 S.E.2d 824 (1959).

4-4-46. Administrative remedies.

Any person affected by this part or by any rule or regulation adopted pursuant to this part shall have and shall be required to exhaust the administrative remedies provided by Code Section 4-6-8. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 15; Code 1981, § 4-4-45; Code 1981, § 4-4-46, as redesignated by Ga. L. 1989, p. 1414, § 1.)

44-47. Funding of inspection system for slaughtering establishments unable to qualify for federal inspection; adoption of grading standards for use in inspections of such establishments.

The Governor is authorized to make available to the department the funds necessary to provide an inspection system for those slaughtering establishments in this state which are unable to qualify for federal inspection. The department is authorized to adopt appropriate grading standards to be used in the inspection of such establishments so as to indicate on each carcass inspected the grade and quality thereof. (Ga. L. 1959, p. 191; Code 1981, § 44-46; Code 1981, § 44-47, as redesignated by Ga. L. 1989, p. 1414, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 67. **C.J.S.** — 3A C.J.S., Animals, § 80.

44-48. Penalty for violations of part or rules or regulations promulgated thereunder.

Any person, firm, partnership, or corporation which violates any provision of this part or any rule or regulation made pursuant to this part shall be guilty of a misdemeanor. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 11; Ga. L. 1956, p. 85, § 2; Code 1981, § 44-47; Code 1981, § 44-48, as redesignated by Ga. L. 1989, p. 1414, § 1.)

PART 4

PREVENTING SPREAD OF LIVESTOCK DISEASES

Cross references. — Powers and duties of Commissioner regarding inspection of cattle, sheep, horses, etc., before entry into slaughtering, packing, or other similar establishments, § 26-2-102.

Health and transportation of domestic animals, livestock and poultry, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Department of Agriculture, Chapters 40-13-2 and 40-13-3.

Administrative rules and regulations. —

44-60. Extermination of parasites and development of livestock industry under supervision and control of Commissioner; employment of inspectors and veterinarians; public report.

The work of exterminating the cattle fever tick, screwworm, and other parasites and of developing the livestock industry in this state shall be under the supervision and control of the Commissioner, who is authorized to employ persons qualified to act as livestock inspectors and supervising veterinarians. The Commissioner shall publish a detailed statement annually of the expenditures and progress of this work for free public distribution. (Ga. L. 1912, p. 22, § 2; Code 1933, § 62-1012.)

44-61. Duties of livestock inspectors and supervising veterinarians generally.

It shall be the duty of all livestock inspectors and supervising veterinarians employed by the Commissioner to enforce the provisions of this part and any rule, regulation, or order made pursuant thereto. (Ga. L. 1912, p. 22, § 3; Code 1933, § 62-1013.)

44-62. Right of entry of inspectors.

The Commissioner or any duly authorized livestock inspector is authorized and empowered, in the discharge of the duties imposed upon him by this part, to enter the premises or any barn or building where livestock are temporarily or permanently kept in this state. (Ga. L. 1909, p. 131, § 6; Civil Code 1910, § 2078; Code 1933, § 62-1008.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 33. **C.J.S.** — 3A C.J.S., Animals, § 69 et seq.

44-63. Appointment of federal livestock inspectors as state livestock inspectors.

The Commissioner may appoint or commission federal veterinarians or livestock inspectors to work as state livestock inspectors, provided that they shall act without pay from the state. (Ga. L. 1909, p. 131, § 9; Civil Code 1910, § 2081; Code 1933, § 62-1010.)

JUDICIAL DECISIONS

Acceptance of federal regulation. — The Act from which this section was taken amounts to an acceptance of the regulations and methods of the Secretary of Agriculture of United States. Thornton v. United States, 2 F.2d 561 (5th Cir. 1924), aff'd, 271 U.S. 414, 46 S. Ct. 585, 70 L. Ed. 1013 (1926).
Cited in Gill v. Cox, 163 Ga. 618, 137 S.E. 40 (1927).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 31. **C.J.S.** — 3A C.J.S., Animals, § 66.

44-64. Establishment and maintenance of quarantine lines for protection of livestock generally.

(a) As used in this Code section, the term "animal" means the domestic animals and livestock of this state, including poultry.

(b) In addition to any other quarantine and inspection duties imposed by law, the Commissioner shall establish quarantine lines against the introduction of any animals, any animal carcasses or parts thereof, any biological products or preparations, or any live viruses or other disease vectors when in his judgment such a quarantine is necessary for the protection of the livestock of this state from any contagious or infectious disease. The Commissioner is authorized to make such rules and regulations as he may deem necessary to prevent, suppress, control, and eradicate such contagious or infectious diseases. The Commissioner may allow the movement into the quarantined area of the types of animals or products against which quarantine is imposed when, after inspection, he is satisfied that the animals or products being moved into the quarantined area are free of disease or that they will be handled so as not to introduce or spread disease. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 16.)

Cross references. — Quarantine powers of Commissioner pertaining to control of equine diseases, § 4-4-120.

OPINIONS OF THE ATTORNEY GENERAL

Contract with university for veterinary services. — Georgia Department of Agriculture may contract with Department of Veterinary Medicine at University of Georgia to provide certain veterinary services to livestock owners in conjunction with the brucellosis and tuberculosis testing and eradication programs. 1980 Op. Att'y Gen. No. 80-62.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, §§ 67, 73.

4-4-65. Maintenance of quarantine along state borders to prevent introduction of parasites or diseases into state.

The Commissioner shall provide and maintain an effective quarantine along the borders of Georgia by the use of patrols or in such other manner as in his judgment will prevent the introduction of cattle fever tick, screwworm, or other parasites or other contagious or infectious diseases into the state. (Ga. L. 1924, p. 78, § 1; Code 1933, § 62-1019.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 31. **C.J.S.** — 3A C.J.S., Animals, § 66.

4-4-66. Movement of cattle infested with parasites.

The movement of cattle infested with cattle fever tick, screwworm, or other parasites into, within, or through the state at any time or for any

purpose, except as provided for in this part, is prohibited. (Ga. L. 1918, p. 256, § 1; Code 1933, § 62-1014.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, §§ 74, 82.

4-4-67. Establishment of quarantines in areas in which livestock affected with or exposed to contagious or infectious disease; transportation of livestock within and from quarantined areas.

(a) The Commissioner or any duly authorized livestock inspector is authorized and required to quarantine any stall, lot, yard, pasture, field, farm, premises, packing house, rendering plant, town, city, militia district, county, or any part thereof or the whole of the state when he shall determine that livestock in such place or places are affected with, exposed to, or suspected of being exposed to a contagious or infectious disease or with anything which might cause such disease. The Commissioner or any livestock inspector shall provide written or printed notice of the establishment of such quarantine to the owners or keepers of such livestock and to the proper officers of railroad, steamboat, motor vehicle, or other transportation companies doing business in or through the quarantined territory.

(b) No such transportation company shall receive for transportation or shall transport livestock from any quarantined area to any nonquarantined area, except as provided for in this part. No person, company, corporation, or other entity shall drive or cause to be driven or permit to go astray any livestock from any quarantined area to any nonquarantined area, except as provided for in this part.

(c) Livestock may be moved within a quarantined area or removed from a quarantined area only under and in compliance with the rules and regulations of the Commissioner. It shall be unlawful to move livestock within or from a quarantined area in any other manner or under any conditions other than those prescribed by the rules and regulations of the Commissioner. (Ga. L. 1909, p. 131, §§ 3, 4; Civil Code 1910, §§ 2075, 2076; Code 1933, §§ 62-1005, 62-1006; Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 17.)

JUDICIAL DECISIONS

Cited in *Talmadge v. Sutton*, 175 Ga. 811, 166 S.E. 240 (1932).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, §§ 67, 73.

4-4-68. Employment of veterinary surgeon or expert.

(a) When the Commissioner receives a request to investigate, treat, or otherwise prevent the spread of an infectious or contagious disease affecting the livestock of a county, he shall employ a competent veterinary surgeon or expert to investigate the causes of the disease, to treat the same, and otherwise prevent its spread.

(b) The Commissioner is authorized to fix the compensation of the veterinary surgeon or expert. (Ga. L. 1905, p. 121, § 1; Civil Code 1910, § 2069; Code 1933, § 62-1011; Ga. L. 1956, p. 332, § 1.)

JUDICIAL DECISIONS

Cited in *Talmadge v. Sutton*, 175 Ga. 811, 166 S.E. 240 (1932).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32. **C.J.S.** — 3A C.J.S., Animals, §§ 67, 73.

4-4-69. Regulation of manufacture and use of disease vectors.

(a) As used in this Code section, the term “disease vector” means any agent or material which has the power to produce or spread disease in livestock.

(b) No experimental or research work, except at or under the direction of the College of Veterinary Medicine of the University of Georgia, the Georgia Poultry Improvement Association Laboratory, the College of Agricultural and Environmental Sciences of the University of Georgia, and the state agricultural experiment stations, shall be carried on in this state with any live virus or any other disease vector. No such virus or disease vector shall be manufactured or distributed in this state except under permit issued by the Commissioner and conditioned, as in his judgment necessary, to prevent the spread of such disease.

(c) This Code section shall not apply to the county health departments, the Department of Human Resources, the United States Department of Health and Human Services, accredited medical and dental colleges and universities, approved hospitals, approved medical centers, or foundations engaged in medical research, diagnosis, or treatment of the diseases of man. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 18; Ga. L. 1995, p. 10, § 4.)

The 1995 amendment, effective February 21, 1995, part of an Act to correct errors and omissions in the Code, substituted "College

of Agricultural and Environmental Sciences" for "College of Agriculture" in the first sentence of subsection (b).

OPINIONS OF THE ATTORNEY GENERAL

This section is directed at monitoring the spread of disease in livestock. 1975 Op. Att'y Gen. No. 75-23.

General prohibition on distribution and manufacture. — The regulation of live viruses established in this section entails a general prohibition on the distribution and manufacture of such viruses except under permit issued by the Commissioner of Agriculture, in accordance with any conditions he might direct. 1975 Op. Att'y Gen. No. 75-23.

Limitation on authority of Commissioner to issue permits. — The authority of the

Commissioner of Agriculture to issue permits for the manufacture and distribution of certain live viruses and disease vectors, and of biologicals does not empower the Commissioner to prohibit distribution of certain vaccines to certain individuals. 1975 Op. Att'y Gen. No. 75-23.

Authorization of department to impound live rabies vaccine. — The Department of Agriculture is not authorized to impound live rabies vaccine in order to preclude the distribution of the vaccine to individuals other than licensed veterinarians. 1975 Op. Att'y Gen. No. 75-23.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32.

C.J.S. — 3A C.J.S., Animals, § 67.

4-4-70. Conduct of programs to eradicate contagious or infectious diseases generally.

Whenever it is determined by the Commissioner, in cooperation with the United States Department of Agriculture, that a contagious or infectious disease should be eradicated, the Commissioner is authorized to take whatever steps are necessary to eradicate the disease. Owners, renters, or persons in possession of livestock or premises infected with such a disease shall be required to disinfect the premises and to destroy the cause or causes of the contagious or infectious disease, including the destruction of those livestock on the premises, under the supervision and direction of the Commissioner or his duly authorized representative. The cost of destroying the cause or causes or sources of infection of a contagious or infectious disease which is sought to be eradicated shall be borne by the owner, renter, or person in possession of the infected or quarantined premises. However, when budget conditions permit or when federal matching funds are available, the Commissioner may participate in the cost of eradication and is authorized to expend such funds as are available. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 21.)

JUDICIAL DECISIONS

Authority of Commissioner to issue and withdraw payment for destruction of live-

stock. — If the Commissioner of Agriculture has authority to issue an order making pay-

ment for herds of swine destroyed by cholera but is allowed by statute to destroy swine infected with cholera, without making payment therefor, then an order notifying all owners of garbage-fed swine that hereafter no further payments would be made because of the continued outbreak of cholera, was perfectly legal and one of the rights conferred upon him by this section. *Irvin v. Woodliff*, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

The Commissioner of Agriculture is empowered to destroy livestock under certain conditions, such as where herds of swine are infected with cholera, and the Commissioner is authorized (but not required) to make payment to those whose herds are destroyed. *Irvin v. Woodliff*, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

OPINIONS OF THE ATTORNEY GENERAL

Contract with university for veterinary services. — Georgia Department of Agriculture may contract with Department of Veterinary Medicine at University of Georgia to provide

certain veterinary services to livestock owners in conjunction with the brucellosis and tuberculosis testing and eradication programs. 1980 Op. Att'y Gen. No. 80-62.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq.

C.J.S. — 3A C.J.S., Animals, § 67 et seq.

44-71. Cooperation of Commissioner with other officials in establishing quarantine lines.

The Commissioner shall cooperate with officials of other states and with the secretary of agriculture of the United States in establishing quarantine lines. (Ga. L. 1899, p. 97, § 3; Civil Code 1910, § 2072; Code 1933, § 62-1002; Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 20.)

OPINIONS OF THE ATTORNEY GENERAL

Authorization to assist federal government in expenditure of funds. — The Department of Agriculture is authorized to join in with the federal government in the expen-

diture of funds to disinfect and clean up premises which have been infected with vesicular diseases. 1952-53 Op. Att'y Gen. p. 3.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq.

C.J.S. — 3A C.J.S., Animals, § 73.

44-72. Indemnification of owners of livestock destroyed in eradication of diseases.

(a) The Commissioner is authorized, in cooperation with the United States Department of Agriculture, to indemnify the owner of livestock destroyed in eradicating any infectious or contagious disease, upon such basis and appraisal as the federal government prescribes; but in no event

shall the state pay more than one-half of the indemnity and cost incident to the eradication.

(b) In the case of public stockyards, meat packing establishments, slaughterhouses, community sales, and licensed garbage feeders, the state shall not pay in participation with the United States Department of Agriculture more than one-third of the indemnity and cost incident to the eradication. However, the Commissioner may make indemnity payments inapplicable to garbage feeders if in any case he finds the feeding of garbage to be a source of such disease.

(c) Any person, firm, partnership, or corporation which shall violate any quarantine law or rule and regulation thereunder shall be ineligible for indemnity.

(d) The Commissioner is authorized, in the eradication of any infectious or contagious disease, to indemnify the owner of livestock destroyed in eradicating the disease in those instances in which the United States Department of Agriculture cannot participate in the payment of the indemnity.

(e) The limits on the amount of payment to be made by the state as set out in this Code section shall have no application to payments in excess of such limits authorized by law for the purpose of elimination of swine mycobacteriosis. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 22; Ga. L. 1957, p. 488, § 1; Ga. L. 1979, p. 1032, § 12.)

JUDICIAL DECISIONS

Denial of compensation not violative of constitutional prohibition. — Laws enacted in pursuance of police power to benefit the health of the public, which may result in the destruction of private property, and which do not provide for any payment therefor to the owner, are not violative of the constitutional inhibition against taking private property for a public use without compensation. *Irvin v. Woodliff*, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

Payment pursuant to this section is a benefit. — The making of a payment pursuant to this section must be classified as a "benefit" — and the rule therefore is within the exception made by § 50-13-2(6)(I), and as to which, no permission to sue the state is given under the Administrative Procedure Act. *Irvin v. Woodliff*, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

An order by the Commissioner as to payment for destroyed herds of swine pursuant to this section is a benefit under

§ 50-13-2(6)(I). *Irvin v. Woodliff*, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

While every benefit is not an indemnity, necessarily, every indemnity is a benefit. *Irvin v. Woodliff*, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

Authority to issue and withdraw payment for destruction of livestock. — If the Commissioner of Agriculture has authority to issue an order making payment for herds of swine destroyed by cholera but is allowed by statute to destroy swine infected with cholera, without making payment therefor, then an order notifying all owners of garbage-fed swine that hereafter no further payments would be made because of the continued outbreak of cholera, was perfectly legal and one of the rights conferred upon him by this section. *Irvin v. Woodliff*, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

The Commissioner of Agriculture is empowered to destroy livestock under certain conditions, such as where herds of swine are

infected with cholera, and the Commissioner is authorized (but not required) to make payment to those whose herds are

destroyed. *Irvin v. Woodliff*, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 *Am. Jur. 2d, Animals*, § 32 et seq.

C.J.S. — 3A *C.J.S., Animals*, § 67 et seq.

44-73. Transfer of state funds to eradication programs for purposes of matching federal funds.

For the purpose of matching available federal funds where state funds are insufficient, the Governor may transfer money from any available funds in the state treasury to a program of eradication of a contagious or infectious disease, which program is supported by federal funds, contingent on matching state funds. The money so transferred shall be repaid to the fund from which it was taken when money becomes available for that purpose by legislative appropriation or otherwise. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 23.)

OPINIONS OF THE ATTORNEY GENERAL

Contract with university for veterinary services. — Georgia Department of Agriculture may contract with Department of Veterinary Medicine at University of Georgia to provide

certain veterinary services to livestock owners in conjunction with the brucellosis and tuberculosis testing and eradication programs. 1980 Op. Att'y Gen. No. 80-62.

44-74. Penalty for violation of quarantine.

Any person, firm, partnership, or corporation which violates any quarantine provision, rule, or regulation established by the Commissioner under the authority of law for the protection of the livestock and domestic animals of this state shall be guilty of a misdemeanor. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 19.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 *Am. Jur. 2d, Animals*, § 33.

C.J.S. — 3A *C.J.S., Animals*, § 92.

44-75. Interfering with Commissioner or livestock inspectors.

Any person who shall forcibly resist, oppose, assault, prevent, impede, or interfere with the Commissioner or any duly authorized livestock inspector in the execution of his duties or on account of the execution of such duty shall be guilty of a misdemeanor. (Ga. L. 1909, p. 131, § 6; Penal Code 1910, § 583; Code 1933, § 62-9911.)

JUDICIAL DECISIONS

Evidence sufficient to show violation. — Where the evidence showed that the accused stood in front of the dipping vat with a stick and beat back the cows and said that he would not allow then to be dipped if a paint mark was put on them, the accused had violated this section. *Green v. State*, 28 Ga. App. 1, 110 S.E. 427 (1921).

44-76. Importation of diseased livestock.

Any person who shall knowingly import within the limits of this state any livestock with contagious diseases, except distemper, shall be guilty of a misdemeanor. (Ga. L. 1901, p. 82, §§ 1, 2; Penal Code 1910, § 581; Code 1933, § 62-9910.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 37, 38. **C.J.S.** — 3A C.J.S., Animals, § 82.

PART 5

LIVE POULTRY DEALERS, BROKERS, AND MARKET OPERATORS

OPINIONS OF THE ATTORNEY GENERAL

Fingerprintable offenses. — A violation of any Code section in this part is an offense for which those charged with a violation are to be fingerprinted. 1987 Op. Att'y Gen. No. 87-21.

44-80. Definitions.

As used in this part, the term:

(1) "Dealer" or "broker" means any person, firm, or corporation engaged in the business of buying live poultry of any kind for resale or in selling live poultry of any kind bought for the purpose of resale. Every agent acting for or on behalf of any dealer, broker, or poultry market operator is a dealer or broker, provided that any farmer acquiring poultry solely for the purpose of rearing and feeding such poultry as a part of his or her farm operations is not a "dealer" or "broker."

(2) "Person" means any person, firm, corporation, association, cooperative, or combination thereof.

(3) "Poultry" means domestic fowl including, but not limited to, water fowl such as geese and ducks; birds which are bred for meat and egg production, exhibition, or competition; game birds such as pheasants, partridge, quail, and grouse, as well as guinea fowl, pigeons, doves, peafowl; and all other avian species. Such term shall not include ratites, which are considered to be livestock under the laws of this state.

(4) "Poultry market operator" means any person engaged in the business of operating public auctions or sales of live poultry or of operating barns and yards for the containment of live poultry held for the purpose of auction or sale.

(5) "Sales establishment" means any yard, barn, or other premises where live poultry is offered for sale, auction, or exchange. (Code 1981, § 4-4-80, enacted by Ga. L. 1987, p. 525, § 1; Ga. L. 1995, p. 244, § 6.)

The 1995 amendment, effective April 7, 1995, added the second sentence of paragraph (3).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, "pigeons" was substituted for "pidgeons" in paragraph (3).

4-4-81. Infected or diseased poultry — Sale, auction, transfer, or movement; inspection; reports; diagnosis.

No dealer, broker, poultry market operator, or other person shall sell, auction, transfer, or move any poultry which is infected or exposed to a highly infectious or contagious disease or which has been placed under quarantine by the authority of the Commissioner. Until all such poultry has been inspected by a veterinarian approved by the Commissioner, no dealer, broker, or poultry market operator shall sell, auction, transfer, or move any poultry which has been infected, which is suspected of being infected, or which is likely to have been exposed to infection. Any such poultry shall be reported to the department. Representative specimens of such poultry shall be submitted to a state diagnostic laboratory for diagnosis. (Code 1981, § 4-4-81, enacted by Ga. L. 1987, p. 525, § 1.)

4-4-82. License requirement; records requirement; transportation equipment; disposal pit or incinerator.

(a) No poultry market operator shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. No poultry dealer or broker shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. There shall be a fee of \$25.00 per annum for such license.

(b) The license of any licensed dealer, broker, or poultry market operator violating this part or any rule or regulation adopted by the Commissioner pursuant to this part shall be subject to revocation, cancellation, or suspension following a notice and hearing.

(c) No dealer, broker, or poultry market operator shall buy, store, or otherwise receive any poultry without first recording the name and address of the person or persons from whom the poultry is received, the number and type of such poultry, and the motor vehicle license tag number of the vehicle used by the person or persons to transport the poultry. The dealer, broker, or poultry market operator shall also keep records of the name and

address of the person or persons buying such poultry. These records shall be maintained for two years. All records shall be subject to review by the Commissioner or a representative or employee of the department.

(d) Any dealer, broker, or poultry market operator who transports live poultry shall keep all cages, coops, trucks, and trailers clean and sanitary. All equipment used to transport live poultry shall be cleaned and disinfected after each use.

(e) Each dealer, broker, and poultry market operator shall have a poultry disposal pit or incinerator which has been approved by the Commissioner and shall use such pit or incinerator to properly dispose of dead poultry. (Code 1981, § 4-4-82, enacted by Ga. L. 1987, p. 525, § 1.)

44-83. Quarantines; rules and regulations for disease control; confiscation, destruction, or disposal of diseased poultry, eggs, chicks, or stock.

(a) In the control, suppression, prevention, and eradication of poultry diseases, the Commissioner or any duly authorized inspector or employee of the department acting under the authority of this part or any other poultry law of this state is authorized to quarantine any premises or any area when he shall determine that any poultry in such place or places is infected with a contagious or infectious disease, that the unsanitary condition of such place or places might cause the spread of such disease, or that the owner or occupant of such place or places has not observed sanitary practices.

(b) The Commissioner is authorized to promulgate and adopt rules and regulations prescribing sanitary standards and requirements for the prevention, control, suppression, and eradication of poultry diseases in this state. Such regulations shall be no less adequate for the protection of the poultry industry and the public health than those regulations of the Secretary of Agriculture of the United States.

(c) The Commissioner is authorized, in his discretion, to confiscate, destroy, or otherwise dispose of any poultry, hatching eggs, chicks, or breeding stock which is infected with any contagious or infectious diseases. (Code 1981, § 4-4-83, enacted by Ga. L. 1987, p. 525, § 1.)

44-84. Penalties.

Any dealer, broker, or poultry market operator who violates any provision of this part or any quarantine order issued by the Commissioner under the authority of this part or any other law of this state for the protection of the general public in the prevention of poultry diseases shall be guilty of a misdemeanor. (Code 1981, § 4-4-84, enacted by Ga. L. 1987, p. 525, § 1.)

ARTICLE 2

BOVINE DISEASES

4-4-90. Purpose of article.

The purpose of this article is to safeguard public health by controlling and, if practical, eradicating any and all diseases of cattle which are communicable to man. (Ga. L. 1937, p. 591, § 1.)

4-4-91. "Qualified veterinarians" defined.

The term "qualified veterinarians," as used in this article, means veterinarians approved by the Commissioner and the secretary of agriculture of the United States to administer tuberculin tests to cattle intended for interstate shipment. (Ga. L. 1927, p. 348, § 4; Code 1933, § 62-1104.)

4-4-92. Duty of Commissioner to eradicate tuberculosis; county appropriations; right of entry to test cattle; assistance by owners of cattle.

(a) It shall be the duty of the Commissioner to eradicate tuberculosis in cattle. The Commissioner shall have full and complete authority and responsibility in all livestock sanitary control work.

(b) To enable the Commissioner to eradicate bovine tuberculosis effectively and to aid him in establishing a modified accredited tuberculosis-free area, in conformity with the rules and regulations promulgated by the United States Animal Health Association and adopted by the secretary of agriculture, United States Department of Agriculture, the authority having charge of county affairs of any county in which the state and federal governments jointly engage in a tuberculosis eradication campaign may appropriate such sums as they may deem adequate and necessary to aid in this work. The Commissioner or his duly authorized agent is empowered to enter upon any premises, barn, lot, or any other place where cattle are kept, for the purpose of applying tests with tuberculin to ascertain whether or not the cattle so tested are affected with tuberculosis. The owners or keepers of such cattle shall render such reasonable assistance as may be required to enable the Commissioner or his agent to apply the test with accuracy and promptness. (Ga. L. 1927, p. 348, § 1; Code 1933, § 62-1101.)

OPINIONS OF THE ATTORNEY GENERAL

Contract with university for veterinary services. — Georgia Department of Agriculture may contract with Department of Veterinary Medicine at University of Georgia to provide

certain veterinary services to livestock owners in conjunction with the brucellosis and tuberculosis testing and eradication programs. 1980 Op. Att'y Gen. No. 80-62.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, § 69 et seq.

4-4-93. Notice to owners; testing; branding of infected cattle; slaughter.

(a) If the Commissioner receives information or has reason to believe that tuberculosis exists in any cattle, he shall promptly notify the owner or owners and shall arrange to have such cattle tested by a qualified veterinarian.

(b) All cattle which shall react to a tuberculin test shall immediately after such reaction be branded on the left jaw with the letter "T," such letter to be not less than two inches in length; and in addition such reactors shall be tagged in the left ear with a special tag to be adopted by the Commissioner. All cattle so identified shall be slaughtered within a period of 14 days immediately following such reaction, such slaughter to be under the direction of the Commissioner in a slaughterhouse where federal or competent local meat inspection is maintained. The owners of such reactors to the tuberculin test shall be indemnified for such cattle, as provided for in this article. (Ga. L. 1927, p. 348, § 2; Code 1933, § 62-1102.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, § 69 et seq.

4-4-94. Indemnification of owners.

Before having such reacting cattle slaughtered, the Commissioner shall notify the owner of his findings as to the condition of the cattle. The owner shall be indemnified in an appropriate amount, to be determined by the Commissioner using the standards set forth in Code Section 4-4-72, from available funds. (Ga. L. 1927, p. 348, § 3; Code 1933, § 62-1103.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, § 69 et seq.

4-4-95. Use or sale of veterinary tuberculin.

No person, firm, or corporation shall administer veterinary tuberculin, except qualified veterinarians. No person, firm, or corporation shall sell, offer for sale or distribution, or keep on hand any veterinary tuberculin, except qualified veterinarians, licensed druggists, or others lawfully engaged in the sale of veterinary biological products. (Ga. L. 1927, p. 348, § 4; Code 1933, § 62-1104.)

Cross references. — Use of drugs of the sulfanilamide or sulfonamide group for use in control of livestock diseases, § 26-4-6.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, § 69 et seq.

4-4-95.1. Transport of cattle; segregation of cattle with brucellosis; removal or alteration of cattle identification; rules and regulations; sale of infected cattle.

(a) As used in this Code section, the term:

(1) “Cattle” or “cow” means bovine animals, such as cows, bulls, steers, heifers, and bison.

(2) “Person” means any individual, partnership, corporation, association, or other entity.

(b) It shall be unlawful for any person to transport or cause to be transported into the State of Georgia any cattle:

(1) Unless each cow is accompanied by a health certificate containing such information and in such form as may be provided for by rules and regulations of the Commissioner or unless each such cow is listed on an accompanying waybill and is transported directly to a federally approved or state approved slaughtering establishment and is not allowed to come into contact with any other cattle in this state until its arrival at such establishment;

(2) Which are infected with brucellosis, unless such cattle are transported directly to a federally approved or state approved slaughtering establishment and are not allowed to come into contact with any other cattle in this state until their arrival at such establishment or unless a permit has been issued by the Commissioner allowing the importation or movement of such cattle and all conditions of such permit are complied with by the person transporting such cattle; or

(3) Which originate from a quarantined herd or a quarantined area, unless the Commissioner has issued a permit authorizing the importation or movement of such cattle and all conditions of such permit are complied with by the person transporting such cattle.

(c) It shall be unlawful for any person to move any cattle within this state in violation of any quarantine order imposed by the Commissioner or to allow any cow which such person knows or, through the use of reasonable inquiry, should know is from a quarantined herd or area to come into contact with any other cattle, except as authorized by a permit issued by the

Commissioner or as authorized in rules and regulations adopted by the Commissioner.

(d) (1) Any person violating subsection (b) or (c) of this Code section for the first time on or after July 1, 1985, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed \$100.00 for each cow transported or moved in violation of subsection (b) or (c) of this Code section, or in lieu of prosecution such person may be issued a warning by the Commissioner.

(2) Any person violating subsection (b) or (c) of this Code section for a second time on or after July 1, 1985, shall be guilty of a misdemeanor of a high and aggravated nature.

(3) Any person violating subsection (b) or (c) of this Code section for a third or subsequent time on or after July 1, 1985, shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed \$10,000.00 or imprisonment for not less than one year nor more than three years, or both.

(e) Any person who owns or has custody or control over any cattle infected with brucellosis or which are known reactor animals to an official brucellosis test shall segregate such cattle in such manner that they cannot come into contact with other cattle or spread such brucellosis infection to other cattle. Any person who fails to take such action within 30 days following an order from the Commissioner to do so shall be guilty of a misdemeanor and each day of continued failure to comply with such order shall constitute a separate offense.

(f) Any person who removes, defaces, alters, or otherwise changes any official permanent mark, brand, tattoo, tag, or other means of identification on any cow for which a health certificate or permit or official test has been issued or performed under this chapter or the rules and regulations of the Commissioner or which has a known brucellosis infection or is a known reactor animal to an official brucellosis test shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed \$10,000.00 or by imprisonment for not less than one year nor more than three years, or both.

(g) The Commissioner is authorized to adopt rules and regulations, issue orders and permits, and impose quarantines when such actions are authorized or required by federal or state law or are appropriate to prevent the introduction or spread of brucellosis into or within this state, any area thereof, or any cattle located therein.

(h) Any person who knowingly sells any cow within this state which is infected with brucellosis or which such person knows or, through the use of reasonable inquiry, should know is from a quarantined herd or area and who sells such cow without disclosing such fact to the purchaser, prior to the

consummation of the sale, shall be liable for all reasonable and foreseeable damages incurred by the purchaser as a proximate result of the purchaser mixing such cow with other cattle owned or under the control of the purchaser. (Code 1981, § 4-4-95.1, enacted by Ga. L. 1985, p. 704, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, “accompany- ing” was substituted for “accompaning” in paragraph (1) of subsection (b).

4-4-96. Applicability of article to anthrax and brucellosis.

This article shall apply to the control and, if possible, the eradication of anthrax and brucellosis as well as to the eradication of bovine tuberculosis. (Ga. L. 1937, p. 591, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, § 69 et seq.

4-4-96.1. Injunctions.

In addition to the remedies provided in this article and notwithstanding the existence of any adequate remedy at law, the Commissioner is authorized to apply to the superior court for an injunction. Such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of this article or for failing or refusing to comply with the requirements of this article or any rule or regulation adopted by the Commissioner under this article. An injunction issued under this Code section shall not require a bond. (Code 1981, § 4-4-96.1, enacted by Ga. L. 1991, p. 361, § 1.)

4-4-97. Penalty for violations of article.

Any person violating any provision of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than \$25.00 for each offense. (Ga. L. 1927, p. 348, § 6; Code 1933, § 62-9914.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 37-39. **C.J.S.** — 3A C.J.S., Animals, § 77 et seq.

ARTICLE 3
EQUINE DISEASES

Administrative rules and regulations. — Georgia, Rules of Georgia Department of The Equine Act of 1969, Official Compilation of Rules and Regulations of State of Agriculture, Chapter 40-16-3.

RESEARCH REFERENCES

ALR. — Keeping horses as nuisance, 27 ALR3d 627.

44-110. Short title.

This article may be cited as the “Georgia Equine Act.” (Ga. L. 1969, p. 1021, § 1.)

44-111. Definitions.

As used in this article, the term:

(1) “Bond” means a written instrument, issued or executed by a bonding, surety, or insurance company licensed to do business in this state, guaranteeing that the person bonded shall faithfully fulfill the terms of the contract of purchase and guarantee the payment of the purchase price of all equines purchased by him, made payable to the Commissioner for the benefit of persons sustaining loss resulting from the nonpayment of the purchase price or the failure to fulfill the terms of the contract of purchase.

(2) “Dealer” or “broker” means any person, firm, or corporation engaged in the business of buying equines of any kind for resale or in selling equines of any kind bought for the purpose of resale or in buying equines of any kind for slaughter; and every agent acting for or on behalf of any dealer or broker or livestock market operator is, for the purpose of this article, a dealer or broker; provided, however, that any persons acquiring equines for the purpose of using them as a part of their operations or for pleasure only are exempt from the definition herein applicable to dealer or broker.

(3) “Equine” includes horses, mules, asses, and any other members of the Equidae species.

(4) “Livestock market operator” means any person, firm, or corporation engaged in the business of operating public auctions or sales of equines or of operating barns and yards for the containment of equines held for the purpose of auction or sale.

(5) “Special sale” means any sale by a dealer, broker, or livestock market operator held at a time other than a regularly scheduled time;

provided, however, that any sale by any individual of his own entire stock of equines or part thereof on his own premises shall not be considered a special sale. (Ga. L. 1969, p. 1021, § 2.)

44-112. Sale, auction, transfer, or moving of equines.

No dealer, broker, or livestock market operator shall sell, auction, transfer, or move any equines which are infected with any infectious or contagious disease or which have been placed under quarantine by the authority of the Commissioner. No dealer, broker, or livestock market operator shall sell, auction, transfer, or move any equines which are infected with or which are suspected of being infected with or which are likely to have been exposed to an infectious or contagious disease until all such equines have been inspected by a veterinarian approved by the Commissioner. No dealer, broker, or livestock market operator shall sell, auction, transfer, or move any equines from any barn, yard, or premises unless all sanitary practices and precautions prescribed by the rules and regulations of the Commissioner have been observed in such premises, barn, or yard. (Ga. L. 1969, p. 1021, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq.

C.J.S. — 3A C.J.S., Animals, § 67 et seq.

ALR. — Elements and measure of damages for breach of warranty in sale of horse, 91 ALR3d 419.

44-113. Licensing and bonding requirements generally.

(a) No livestock market operator engaged in the sale of equines shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner; no equine dealer or broker who buys or sells through a livestock market operator shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner, provided that such licenses shall be permanent until canceled, suspended, revoked, or surrendered; such licenses shall be nontransferable and free of charge. Any person, firm, or corporation commencing operation of a new sales establishment for the sale of equines at auction and any dealer or broker commencing such a business shall, prior to obtaining a license, post a bond as required by this Code section. The provisions of this Code section requiring the posting of a bond shall not apply to any authorized agent of a person, firm, or corporation having posted the bond required by this Code section, when such agent is acting for and on behalf of such principal.

(b) No person shall operate a sales establishment for the sale of equines at auction unless he has then in force a bond in an amount calculated as follows:

(1) If the annual sales of the establishment are \$2,600,000.00 or less, the amount of the bond shall be one fifty-second of the amount of annual sales but not less than \$10,000.00;

(2) If the annual sales of the establishment are more than \$2,600,000.00, the amount of the bond shall be \$50,000.00 plus one fifty-second of the amount of annual sales in excess of \$2,600,000.00 times a factor of 0.20; or

(3) An amount calculated under paragraph (1) or (2) of this subsection, if not a multiple of \$5,000.00, shall be rounded to the nearest higher multiple of \$5,000.00.

(c) No dealer or broker shall purchase equines at any sales establishment or directly from producers unless he has then in force a bond in an amount calculated as follows:

(1) Determine a number which is the number of days during the preceding year on which the dealer or broker did business;

(2) Divide the total dollar value of livestock purchased by the dealer or broker during the preceding year by the lesser of:

(A) One-half of the number determined under paragraph (1) of this subsection; or

(B) One hundred thirty;

(3) Adjust the amount obtained under paragraph (2) of this subsection as follows:

(A) If the amount obtained under paragraph (2) of this subsection is \$10,000.00 or less then the amount of the bond shall be \$10,000.00;

(B) If the amount obtained under paragraph (2) of this subsection is more than \$10,000.00 but not more than \$75,000.00 then that amount shall be the amount of the bond; or

(C) If the amount obtained under paragraph (2) of this subsection is more than \$75,000.00 then the amount of the bond shall be the sum of \$75,000.00 plus 10 percent of the amount by which the amount obtained under paragraph (2) of this subsection exceeds \$75,000.00; and

(4) An amount calculated under paragraph (3) of this subsection, if not a multiple of \$5,000.00, shall be rounded up to the nearest multiple of \$5,000.00.

(d) Any equine dealer, broker, or sales establishment operator who would otherwise be required by this Code section to post a bond and who has posted a current livestock dealer's, broker's, or sales establishment's bond under Chapter 6 of this title shall not be required to post any bond

under this Code section if such livestock dealer's, broker's, or sales establishment's bond, in addition to meeting all requirements of Chapter 6 of this title, meets the requirements of paragraph (1) of Code Section 4-4-111.

(e) In calculating amounts of bonds under this Code section, the total amount of annual sales or annual purchases for the preceding calendar year shall be used; but, if an applicant for a license does not have an annual sales history, the Commissioner shall estimate the amount of annual sales or annual purchases which will occur.

(f) (1) As used in this subsection, the term "special sale" means any sale of equines, except a regular sale at an establishment and any sale by a farmer of equines owned by the farmer, with payment made directly to the farmer.

(2) The Commissioner is authorized to prescribe rules and regulations for the operation of special sales. No person shall hold a special sale without obtaining a permit therefor from the Commissioner or his duly authorized representative, which shall be granted without charge upon submission of proof satisfactory to the Commissioner that the person applying for the permit is bonded in an amount equal to one-fourth of the anticipated proceeds of the sale; provided, however, such bond shall be not less than \$10,000.00 and not more than \$150,000.00 in amount.

(3) Associations holding sales of equines consigned by members of the association only shall not be required to procure a bond if the directors of the association accept full responsibility for financial obligations of sale and release the Commissioner, in writing, from any responsibility. (Ga. L. 1969, p. 1021, § 4; Ga. L. 1984, p. 389, § 1; Ga. L. 1985, p. 149, § 4.)

4-4-114. Suspension, cancellation, or revocation of licenses.

Every licensed dealer, broker, livestock market operator, or other person subject to this article who shall violate this article or rules and regulations established by the Commissioner pursuant to this article shall have his license revoked, canceled, or suspended, upon a notice and hearing. (Ga. L. 1969, p. 1021, § 15.)

4-4-115. Inspections; maintenance of equines by persons to whom article applies.

The Commissioner is authorized to have inspections conducted of the equines, of any premises where equines are kept or sold, or of any licensed dealer, broker, livestock market operator, or any other individual to whom this article is applicable. Any licensed dealer, broker, livestock market operator, or any other individual subject to this article shall maintain equines in good, healthy condition. (Ga. L. 1969, p. 1021, § 5.)

44-116. Sales of equines to be in compliance with article, rules, and regulations.

No dealer, broker, livestock market operator, or other individual to whom this article is applicable shall hold or conduct any sale of equines, whether a regular sale or a special sale, without complying with the terms of this article and all rules and regulations promulgated under this article. (Ga. L. 1969, p. 1021, § 7.)

44-117. Furnishing of services of licensed veterinarian at sales; issuance of certificate of health of animals sold; fee.

All licensed dealers, brokers, livestock market operators, or other individuals to whom this article is applicable shall furnish at all sales, including special sales, the services of a licensed, accredited veterinarian, who shall issue to the purchaser of any equines sold a certificate that the animal sold meets all existing health requirements and that the temperature of the animal is normal. The cost of this service shall be paid by the seller and shall not exceed \$1.00 per head. (Ga. L. 1969, p. 1021, § 8.)

RESEARCH REFERENCES

ALR. — Elements and measure of damages for breach of warranty in sale of horse, 91 ALR3d 419.

44-118. Use of drugs, tranquilizers, and medications which result in misrepresentation in sale of equines.

The Commissioner may enact, promulgate, and enforce rules and regulations prohibiting or regulating the use of drugs, tranquilizers, or medications which he determines may conceal defects, falsely enhance the appearance of quality, or otherwise result in misrepresentation in the sale of equines. Such regulations may provide for tests to determine the presence of such drugs, tranquilizers, or medications in equines within a reasonable period prior to sale and may provide for the cost of such tests to be paid by the buyer. (Ga. L. 1972, p. 818, § 1.)

44-119. Certification of health of animals transported into state.

The Commissioner is authorized to require any person, firm, or corporation transporting an equine into this state from any other state to furnish him with a certificate from an accredited veterinarian from the state of origin of such equine, certifying that such equine has not recently been exposed to any contagious or infectious disease, that the animal's temperature is normal, and that the animal is free of any contagious or infectious disease. (Ga. L. 1969, p. 1021, § 12.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 32, 33. **C.J.S.** — 3A C.J.S., Animals, §§ 67, 68.

44-120. Quarantines.

In the control, suppression, prevention, and eradication of equine diseases, the Commissioner or any duly authorized representative acting under his authority is authorized and required to quarantine an animal, premises, or any area when he shall determine that equines in such place or places are infected with a contagious or infectious disease, that the unsanitary condition of such place or places might cause the spread of such disease, that the animal has or has been exposed to any contagious or infectious disease, or that the owner or occupant of such place or places is not observing sanitary practices prescribed under the authority of this or any other equine law of this state. (Ga. L. 1969, p. 1021, § 6.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 33. **C.J.S.** — 3A C.J.S., Animals, § 73.

44-121. Eradication programs.

(a) Whenever it is determined by the Commissioner that a contagious or infectious disease should be eradicated, the Commissioner is authorized to take whatever steps are necessary to eradicate the disease. Owners, renters, or persons in possession of equines or premises infected with such a disease are required to disinfect the premises and to destroy the cause or causes of the contagious or infectious disease, including the destruction of those equines within the premises, under the supervision and direction of the Commissioner or his duly authorized representative.

(b) The cost of destroying the cause or causes or sources of infection of a contagious or infectious disease which is sought to be eradicated shall be borne by the owner, renter, or person in possession of the infected equines or premises; except that, when budget conditions permit, the Commissioner may participate in the cost of eradication and is authorized to expend such funds as are available. (Ga. L. 1969, p. 1021, § 9.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, § 67 et seq.

4-4-122. Indemnification for equines eradicated.

The Commissioner is authorized, to the extent of funds available, in the eradication of any infectious or contagious disease, to indemnify the owner of equines destroyed in eradicating the disease, upon such basis and appraisal as the Commissioner may prescribe, provided that any person, firm, partnership, or corporation which shall violate any quarantine or rule or regulation under this article shall be ineligible for indemnity. (Ga. L. 1969, p. 1021, § 10.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 35. **C.J.S.** — 3A C.J.S., Animals, § 76.

4-4-123. Establishment of compounds and research programs to control or eradicate equine infectious anemia.

(a) Any person, firm, corporation, company, cooperative, association, or other entity is authorized to set up or establish compounds at various places in the state where animals may be taken in order to control, suppress, prevent, and eradicate the equine disease known as “equine infectious anemia” (also known as swamp fever, EIA, and slow fever). It shall be unlawful to establish or operate any such compound without a license issued by the Commissioner. The Commissioner is authorized to issue licenses and to establish, promulgate, and adopt rules, regulations, and standards governing the establishment, construction, design, maintenance, and operation of such compounds. The fee for such licenses shall be \$25.00 per annum, and such licenses shall be renewable annually.

(b) The Commissioner is authorized to establish research programs for the purpose of developing a vaccine or method for the control or eradication of such equine disease in this state. (Ga. L. 1975, p. 1138, § 1.)

4-4-124. Transfer of state funds for use in programs to eradicate contagious or infectious diseases; repayment of funds.

Whenever a program of eradication of a contagious or infectious disease requires funds in excess of funds available for the purpose of eradicating such disease, the Governor may transfer from any available funds in the state treasury such sum of money as may be necessary to meet such emergency; and such money so transferred shall be repaid to the fund from which transferred when money becomes available for that purpose by a legislative appropriation or otherwise. (Ga. L. 1969, p. 1021, § 11.)

4-4-125. Promulgation of rules and regulations.

The Commissioner is authorized to formulate, adopt, promulgate, and

enforce rules and regulations for the purpose of implementing this article. (Ga. L. 1969, p. 1021, § 13.)

4-4-126. Injunctions.

The Commissioner is authorized to seek an injunction against any person, firm, or corporation to which this article is applicable for violation of any provision of this article or any rules or regulations promulgated thereunder. The superior court of the county in which venue is proper shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction restraining any person from committing such violation, notwithstanding the existence of an adequate remedy at law. (Ga. L. 1969, p. 1021, § 16.)

4-4-127. Penalty for violations of article, rules, or regulations.

Any dealer, broker, livestock market operator, or other person subject to this article who violates any provision of this article, any quarantine provision, or any rule or regulation established by the Commissioner under the authority of this or other laws for the protection of the general public in the prevention of equine diseases shall be guilty of a misdemeanor. (Ga. L. 1969, p. 1021, § 14.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 33. **C.J.S.** — 3A C.J.S., Animals, § 92.

ARTICLE 4

SWINE MYCOBACTERIOSIS INDEMNIFICATION

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, § 67 et seq.

4-4-140. Short title.

This article may be cited as the "Georgia Swine Mycobacteriosis Indemnification Act." (Ga. L. 1979, p. 1032, § 1.)

4-4-141. Purpose of article.

Swine mycobacteriosis poses a serious potential health threat to the people of this state. The swine farmers of this state have experienced and are experiencing serious economic losses due to the condemnation of swine infected with mycobacteriosis under the laws of this state. It is in the best

interest of this state to seek the speedy eradication of swine mycobacteriosis in this state, while ensuring a supply of swine meat products in this state, and to provide for indemnification to those persons having swine condemned because such swine are infected with swine mycobacteriosis. (Ga. L. 1979, p. 1032, § 2.)

44-142. Definitions.

As used in this article, all terms shall have the meanings ascribed to them in Code Section 26-2-62. (Ga. L. 1979, p. 1032, § 3.)

44-143. Indemnification for condemned swine — Generally.

(a) The Commissioner is authorized to pay to any animal food manufacturer the actual cost paid by such animal food manufacturer for any swine condemned by reason of infection with swine mycobacteriosis.

(b) In the event that swine infected with mycobacteriosis are passed after inspection under restriction of cooking, the payment authorized by this article may equal but shall not exceed 75 percent of the actual cost paid for such swine. (Ga. L. 1979, p. 1032, § 4.)

44-144. Indemnification for condemned swine — Proof of Georgia origin required.

No payment shall be made under this article unless the party receiving such payment shall first provide such proof as is satisfactory to the Commissioner that the swine for which payment is being made originated from a Georgia farm and that payment to the farmer for such swine has not and shall not be reduced by reason of the condemnation of such swine. (Ga. L. 1979, p. 1032, § 5.)

44-145. Indemnification for condemned swine — Cooperation of person receiving payment required.

No payment shall be made under this article unless the person receiving such payment shall first sign, in a form agreeable to the Commissioner, an agreement to comply with the recommendations of the Commissioner for the control and eradication of swine mycobacteriosis. (Ga. L. 1979, p. 1032, § 6.)

44-146. Indemnification for condemned swine — Release required.

No payment shall be made under this article unless the person receiving such payment shall first sign, in a form agreeable to the Commissioner, an agreement that the payment made under this article is accepted as payment

in full for the swine for which such payment is made. (Ga. L. 1979, p. 1032, § 7.)

44-147. Elimination of disease at farm of origin.

The Animal Industry Division of the department shall take all steps necessary or appropriate to eliminate swine mycobacteriosis from the farm of origin of the swine for which compensation is paid under this article. (Ga. L. 1979, p. 1032, § 11.)

44-148. Promulgation of rules and regulations.

The Commissioner is authorized to promulgate, from time to time, such rules and regulations as are necessary to effectuate the purpose of this article. (Ga. L. 1979, p. 1032, § 8.)

44-149. Cooperation among state and federal agencies.

The State Department of Agriculture is authorized and directed to cooperate with and seek the cooperation of all appropriate state and federal agencies in administering this article. The Commissioner is authorized and directed to take all steps reasonably necessary to ascertain whether any federal funds are or may become available to carry out the purposes of this article and, in the event that such funds are or become available, is authorized and directed to take all reasonable steps necessary to obtain and accept such funds. (Ga. L. 1979, p. 1032, § 9.)

44-150. Conduct of scientific research.

Scientific research necessary or appropriate to carry out the purposes of this article shall be carried out under the direction of the Advisory Board of the College of Veterinary Medicine of the University of Georgia. (Ga. L. 1979, p. 1032, § 10.)

44-151. Injunctions.

In addition to the remedies provided in this article and notwithstanding the existence of any adequate remedy at law, the Commissioner is authorized to apply to the superior court for an injunction. Such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of this article or for failing or refusing to comply with the requirements of this article or any rule or regulation adopted by the Commissioner under this article. An injunction issued under this Code section shall not require a bond. (Code 1981, § 44-151, enacted by Ga. L. 1991, p. 361, § 2.)

CHAPTER 5

DISPOSAL OF DISEASED, DISABLED, OR DEAD ANIMALS

Sec.		Sec.	
4-5-1.	Short title.	4-5-7.	Disposal of carcasses and waste material by livestock sales markets and livestock slaughter establishments.
4-5-2.	"Dead animals" defined.	4-5-8.	Restriction upon transportation of dead animals or parts thereof into state.
4-5-3.	Abandonment of dead animals; requirements as to disposal generally; disposal in wells or open pits or on private property; disposal in city or county dumps.	4-5-9.	Prohibition of transportation of dead animals, effluent, or parts thereof.
4-5-4.	Removal and disposition of dead animals within highway rights of way generally.	4-5-10.	Promulgation of rules and regulations.
4-5-5.	Methods of disposal of dead animals.	4-5-11.	Penalty for violations of chapter or rules or regulations promulgated thereunder.
4-5-6.	Destruction of diseased and disabled animals which have been abandoned.		

Cross references. — Regulation of facilities for handling, disposing of, etc., solid waste, § 12-8-20 et seq. Regulation by Commissioner of business of buying, selling, or transporting in commerce dead, dying, etc., animals or carcasses of such animals, § 26-2-130 et seq.

Administrative rules and regulations. — Dead animals, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-16-2.

RESEARCH REFERENCES

ALR. — Validity, construction, and application of statutes, ordinances, and other regulations relating to transportation or disposal of carcasses of dead animals not slaughtered for food, 121 ALR 732.

Liability for killing or injuring, by motor vehicle, livestock or fowl on highway, 55 ALR4th 822.

4-5-1. Short title.

This chapter shall be known and may be cited as the "Dead Animal Disposal Act." (Ga. L. 1969, p. 1018, § 1.)

4-5-2. "Dead animals" defined.

As used in this chapter, the term "dead animals" means the carcasses, parts of carcasses, effluent, or blood of farm livestock, including poultry, ratites, and equines. (Ga. L. 1969, p. 1018, § 2; Ga. L. 1973, p. 569, § 1; Ga. L. 1995, p. 244, § 7.)

The 1995 amendment, effective April 7, 1995, inserted “, ratites,”.

4-5-3. Abandonment of dead animals; requirements as to disposal generally; disposal in wells or open pits or on private property; disposal in city or county dumps.

(a) It shall be unlawful for any person who owns or is caring for an animal which has died or has been killed to abandon the animal, its parts, or blood. Such person shall dispose of the dead animal as provided for in this chapter or in rules and regulations adopted pursuant to this chapter. Under no conditions may dead animals be abandoned in wells or open pits of any kind on private or public land.

(b) No person shall dispose of an animal, its parts, or blood by burial or burning on the land of another without the permission of the owner of the land.

(c) Arrangements for proper burial or burning must be made with a city or county official in order to dispose of a dead animal in a city or county dump. (Ga. L. 1969, p. 1018, § 3; Ga. L. 1973, p. 569, § 2.)

4-5-4. Removal and disposition of dead animals within highway rights of way generally.

(a) As used in this Code section, the term “dead animals” means the carcasses or parts of carcasses of all animals, regardless of whether they are considered to be farm livestock, poultry, equines, domesticated animals, pets, or any other type of animal and shall include all such animals regardless of the cause of death of such animals.

(b) Any other provision of this chapter to the contrary notwithstanding, it shall be the duty of the Department of Transportation to remove and dispose of the carcasses of all dead animals found within the rights of way of all highways within the state maintained either totally or in part from state funds. Such carcasses or parts of carcasses shall be disposed of in a manner consistent with this chapter. (Ga. L. 1974, p. 404, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, C.J.S. — 3A C.J.S., Animals, § 80. 66
§§ 26, 67. C.J.S., Nuisances, § 32.

4-5-5. Methods of disposal of dead animals.

Methods which can be used for disposal of dead animals are burning, burial, or rendering. Disposal of animal carcasses by any of the approved methods must be completed within 12 hours after death or discovery of the carcass. Carcasses which are burned must be attended until the process is

completed. Carcasses which are buried must be buried at least three feet below the ground level and have not less than three feet of earth over the carcass. (Ga. L. 1969, p. 1018, § 5.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 26, 67.

C.J.S. — 3A C.J.S., Animals, § 80. 66 C.J.S., Nuisances, § 32.

4-5-6. Destruction of diseased and disabled animals which have been abandoned.

For the purpose of putting a speedy end to the suffering of hopelessly diseased and disabled animals, any person finding any abandoned domestic animal which is diseased or injured past recovery may apply to any magistrate of the county, who may summarily decide whether such animal should be destroyed, after giving notice to the owner, if known, whenever such notice can be given without defeating the object of this Code section. The order authorizing the destruction of such animal shall not defeat the owner's claim for damages against the person destroying or procuring the destruction of such animal. (Ga. L. 1878-79, p. 183, § 2; Code 1882, § 4612(b); Civil Code 1895, § 1755; Civil Code 1910, § 2014; Code 1933, § 62-211; Ga. L. 1983, p. 884, § 4-1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 46 et seq.

C.J.S. — 3A C.J.S., Animals, § 123 et seq.

ALR. — Constitutionality of statute or ordinance providing for destruction of animals, 8 ALR 67; 56 ALR2d 1024.

Constitutionality of "dog laws," 49 ALR 847.

Right to and measure of compensation for animals or trees destroyed to prevent spread of disease or infection, 67 ALR 208.

Measure, elements, and amount of damages for killing or injuring cat, 8 ALR4th 1287.

Construction of provisions of statute or ordinance governing occasion, time, or manner of summary destruction of domestic animals by public authorities, 42 ALR4th 839.

4-5-7. Disposal of carcasses and waste material by livestock sales markets and livestock slaughter establishments.

Public livestock sales markets and livestock slaughter establishments shall have an approved method and place for the disposal of all portions of any carcass, including blood, effluent, and all accessory waste material involved in the handling of the carcasses of animals which die on or within the premises of such establishments. (Ga. L. 1969, p. 1018, § 4.)

Cross references. — Inspection of sanitary and meat food products are prepared, conditions of establishments in which meat § 26-2-100 et seq. Duties of Commissioner of

Agriculture to investigate sanitary conditions of slaughtering, meat-canning, etc., establishments, § 26-2-108. Compliance with regulations to prevent diseased animals from being used for human food purposes, § 26-2-130.

Administrative rules and regulations. — Disposal of diseased or otherwise adulterated carcasses, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-10-1-11.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 26, 67.

C.J.S. — 3A C.J.S., Animals, § 80. 66 C.J.S., Nuisances, § 32.

4-5-8. Restriction upon transportation of dead animals or parts thereof into state.

Dead animals or parts thereof, raw or unrendered, except green salted hides, shall not be allowed to enter the State of Georgia except by written permit issued by the Georgia Department of Agriculture; provided, however, that licensed research institutes, accredited colleges or state colleges and universities, and departments of municipal governments may transport and receive dead animals for research or investigational purposes only. (Ga. L. 1969, p. 1018, § 7.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 26, 67.

ALR. — Applicability of state Anti-trust Act to interstate transaction, 24 ALR 787.

C.J.S. — 3A C.J.S., Animals, § 80. 66 C.J.S., Nuisances, § 32.

4-5-9. Prohibition of transportation of dead animals, effluent, or parts thereof.

The Commissioner may prohibit, at his discretion, the hauling or transportation of the body, effluent, or parts of any dead animals and order the destruction thereof in accordance with this chapter. (Ga. L. 1969, p. 1018, § 6; Ga. L. 1973, p. 569, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq.

C.J.S. — 3A C.J.S., Animals, § 67 et seq.

4-5-10. Promulgation of rules and regulations.

The Commissioner is authorized to promulgate rules and regulations to implement and accomplish the purposes of this chapter. (Ga. L. 1969, p. 1018, § 8.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 26, 67. **C.J.S.** — 3A C.J.S., Animals, § 80. 66
C.J.S., Nuisances, § 32.

4-5-11. Penalty for violations of chapter or rules or regulations promulgated thereunder.

Any person, firm, partnership, or corporation which violates any provision of this chapter or any rule or regulation made pursuant thereto shall be guilty of a misdemeanor. (Ga. L. 1969, p. 1018, § 9.)

JUDICIAL DECISIONS

Cited in Collins v. State, 160 Ga. App. 680, 288 S.E.2d 43 (1981).

CHAPTER 6

LIVESTOCK DEALERS AND AUCTIONS

Article 1		Sec.	
Livestock Dealers		4-6-41.	Administration of chapter; promulgation of rules and regulations [Repealed].
Sec.		4-6-42.	Surety bond — Generally.
4-6-1.	Definitions.	4-6-43.	Surety bond — Dealers and brokers generally.
4-6-2.	Sale, auction, transfer, or movement of infected livestock.	4-6-44.	Surety bond — Annual sales and purchases.
4-6-3.	Licenses — Required; fee; term; bonding.	4-6-45.	Surety bond — Acceptance of insurance coverage as satisfaction of bonding requirements [Repealed].
4-6-4.	Licenses — Revocation, cancellation, or suspension.	4-6-46.	Maintenance of records and accounts; inspections.
4-6-5.	Maintenance of records.	4-6-47.	When payment for livestock purchased due; disposition of proceeds; methods of payment.
4-6-6.	Quarantine of premises; promulgation of rules and regulations prescribing sanitary standards.	4-6-48.	Report of dishonor of a check or draft issued in payment for livestock.
4-6-7.	Rules and regulations — Promulgation and enforcement generally.	4-6-49.	Annual reports of sales and purchases; proof of compliance with bonding requirements.
4-6-8.	Rules and regulations — Administrative remedies of persons aggrieved by promulgation or enforcement.	4-6-49.1.	Denial of licenses; Commissioner's right to require disclosures and examine records and accounts; dealers purchasing livestock for cash only; financial statement.
4-6-9.	Injunctions.		
4-6-10.	Penalty for violations of chapter or rules or regulations.		
4-6-11.	Liability of purchaser or seller of leased livestock to owner or lessor of livestock.		
Article 2			
Custodial Accounts for Livestock Sellers			
4-6-20.	Short title.	4-6-50.	Livestock weighed at sales establishment; certified public weigher.
4-6-21.	Maintenance of custodial accounts; deposits; commingling of funds.	4-6-51.	Isolation of employees of sales establishments during conduct of sale.
4-6-22.	Payments from custodial accounts.	4-6-52.	Special sales.
4-6-23.	Penalty for failure to deposit proceeds of sale in custodial account.	4-6-53.	Injunctions [Repealed].
		4-6-54.	Use of persuader in loading or handling of livestock.
Article 3		4-6-55.	Penalty for violation of chapter or rules or regulations promulgated thereunder [Repealed].
Livestock Auctions			
4-6-40.	Definitions [Repealed].		

Cross references. — Criminal penalty for livestock theft, § 16-8-20. Transportation of livestock by common carriers, § 46-9-70 et seq. Sale or disposition of livestock or swine belonging to state, § 50-16-80.

Administrative rules and regulations. — Livestock auctions, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-4.

ARTICLE 1

LIVESTOCK DEALERS

Cross references. — Duty of Commissioner to inspect cattle, sheep, swine, etc.,

before entry into slaughtering, packing, or similar establishments, § 26-2-102.

OPINIONS OF THE ATTORNEY GENERAL

Livestock buying stations, assembly or concentration points. — Livestock buying stations and livestock assembly or concentration points are subject to licensing and dis-

ease control inspection by the Commissioner of Agriculture or his authorized livestock inspectors. 1973 Op. Att'y Gen. No. 73-64.

4-6-1. Definitions.

As used in this chapter, the term:

(1) "Bond" means a written instrument issued or executed by a bonding, surety, or insurance company licensed to do business in this state, guaranteeing that the person bonded shall faithfully fulfill the terms of the contract of purchases and guarantee the payment of the purchase price of all livestock purchased by him, made payable to the Commissioner for the benefit of persons sustaining loss resulting from the nonpayment of the purchase price or the failure to fulfill the terms of the contract of purchase.

(2) "Cash" includes only currency, cashier's checks, and money orders.

(3) "Dealer" is synonymous with the term "broker" and means any person, firm, or corporation, including a packer, engaged in the business of buying livestock of any kind for resale or in selling livestock of any kind bought for the purpose of resale or in buying livestock of any kind for slaughter. Every agent acting for or on behalf of any dealer, broker, or livestock market operator is a dealer or broker.

(A) Farmers acquiring livestock solely for the purpose of grazing and feeding as a part of their farm operations are not encompassed by the definition of "dealer" or "broker"; and

(B) Packers whose total annual purchases of livestock are less than \$50,000.00 who buy only from licensed dealers and licensed sales establishments are not included in the definition of "dealer" or "broker."

(4) "Livestock" means cattle, swine, sheep, ratites, and goats of all kinds and species.

(5) "Livestock market operator" means any person, firm, or corporation engaged in the business of operating a sales establishment, public auctions or sales of livestock, or barns and yards for the containment of livestock held for the purpose of auction or sale.

(6) "Person" means any person, firm, corporation, association, cooperative, or combination thereof.

(7) "Sales establishment" means any yard, barn, or other premises where livestock is sold at auction. (Ga. L. 1952, p. 184, § 1; Ga. L. 1983, p. 1161, § 1; Ga. L. 1995, p. 244, § 8.)

The 1995 amendment, effective April 7, 1995, inserted "ratites," in paragraph (4).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 1. C.J.S. — 3A C.J.S., Animals, §§ 1, 2.

4-6-2. Sale, auction, transfer, or movement of infected livestock.

No dealer, broker, or livestock market operator shall sell, auction, transfer, or move any livestock which are infected with any disease or which have been placed under quarantine by the authority of the Commissioner. Until all such livestock have been inspected by a veterinarian approved by the Commissioner, no dealer, broker, or livestock market operator shall sell, auction, transfer, or move any livestock which have been infected, which are suspected of being infected, or which are likely to have been exposed to infection. No dealer, broker, or livestock market operator shall sell, auction, transfer, or move any livestock from any barn, yard, or premises unless all sanitary practices and precautions prescribed by the rules and regulations of the Commissioner have been observed in the premises, barn, or yard. (Ga. L. 1952, p. 184, § 2; Ga. L. 1983, p. 1161, § 1.)

Cross references. — Making of implied warranties by companies auctioning cattle, hogs, or sheep, § 11-2-316.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. ALR. — Extent of liability of seller of livestock infected with communicable disease, 14 ALR4th 1096.
C.J.S. — 3A C.J.S., Animals, § 67 et seq.

4-6-3. Licenses — Required; fee; term; bonding.

No livestock market operator shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. No livestock dealer or broker who buys or sells through a livestock market operator or directly from producers shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. There shall be no fee for such license. No such license shall be issued to any person unless the applicant therefor furnishes to the Commissioner the required bond. If the bond of a dealer, broker, or livestock market operator is canceled, then the license of such person shall immediately be revoked by operation of law without notice or hearing. (Ga. L. 1952, p. 184, § 3; Ga. L. 1958, p. 386, § 1; Ga. L. 1982, p. 3, § 4; Ga. L. 1982, p. 1804, § 1; Ga. L. 1983, p. 1161, § 1.)

Cross references. — Exemption from municipal property taxes and license fees for sale or introduction into municipality of agricultural products raised in state, § 48-5-356.

Administrative rules and regulations. — Licensing and bonding requirements, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-7.

OPINIONS OF THE ATTORNEY GENERAL

Bond requirement as condition precedent to purchase livestock at auction. — There is nothing in § 4-6-43 or this section to prohibit the individual operator of a livestock auction from requiring a bond or such other security that the operator may require as a condition of permitting the buyer to purchase livestock at the auction. 1958-59 Op. Att'y Gen. p. 3.

Single license for buying stations appropriate. — Where buying stations are operated under the name and auspices of a membership organization, if these various operations are in fact owned or operated by a single person, firm or corporation, a single license covering the operation of all such stations would be appropriate. 1973 Op. Att'y Gen. No. 73-64.

RESEARCH REFERENCES

ALR. — Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 30 ALR 834; 42 ALR 1226; 118 ALR 646.

Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

Single or isolated transactions as falling within provisions of commercial or occupational licensing requirements, 93 ALR2d 90.

Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 ALR3d 637.

4-6-4. Licenses — Revocation, cancellation, or suspension.

Every licensed dealer, broker, and livestock market operator who shall violate this chapter or rules and regulations established by the Commissioner pursuant to this chapter shall have his license revoked, canceled, or suspended, upon a notice and hearing. (Ga. L. 1952, p. 184, § 5; Ga. L. 1983, p. 1161, § 1.)

4-6-5. Maintenance of records.

No dealer, broker, or livestock market operator shall buy, store, or otherwise receive any livestock without first recording the name and address of the person or persons bringing in the livestock and recording the license tag number of the vehicle used by the person or persons to transport the livestock. (Ga. L. 1963, p. 541, § 1; Ga. L. 1983, p. 1161, § 1.)

4-6-6. Quarantine of premises; promulgation of rules and regulations prescribing sanitary standards.

(a) In the control, suppression, prevention, and eradication of livestock diseases, the Commissioner or any duly authorized livestock inspector acting under the authority of this or any other livestock law of this state is authorized and required to quarantine any premises or any area when he shall determine that livestock in such place or places are infected with a contagious or infectious disease, that the unsanitary condition of such place or places might cause the spread of such disease, or that the owner or occupant of such place or places is not observing sanitary practices.

(b) The Commissioner is authorized and empowered to adopt and promulgate rules and regulations prescribing the sanitary standards and requirements for the prevention, control, suppression, and eradication of livestock diseases in this state, such regulations to be no less adequate for the protection of the livestock industry and public health than those of the secretary of agriculture of the United States Department of Agriculture. (Ga. L. 1952, p. 184, § 6; Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32 et seq. **C.J.S.** — 3A C.J.S., Animals, §§ 67 et seq., 73.

4-6-7. Rules and regulations — Promulgation and enforcement generally.

The Commissioner is authorized to formulate, adopt, promulgate, and enforce rules and regulations for the purpose of carrying this chapter into effect. (Ga. L. 1952, p. 184, § 4; Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32. **C.J.S.** — 3A C.J.S., Animals, § 67.

4-6-8. Rules and regulations — Administrative remedies of persons aggrieved by promulgation or enforcement.

Any person affected by any rule or regulation adopted and promulgated by the Commissioner pursuant to any statute conferring such authority upon him, who believes that the Commissioner, in the promulgation of such rules and regulations or in the enforcement thereof, has gone beyond the authority vested in him by law or who believes that the Commissioner has exceeded any power which the legislature of this state under the Constitution of the United States or the Constitution of Georgia conferred upon him, is given the right to protest or object in writing to such rule or regulation or any act done by the Commissioner pursuant to such rule or regulation, as he may believe violates the legal and constitutional authority of the Commissioner, by pointing out in what respect and for what reasons he contends the act, rules, or regulations to be improper or illegal. The Commissioner is required to consider every such objection and afford the aggrieved party opportunity to submit evidence and argument in support of his protest; and if, in his judgment, the protest is in whole or in part well founded, the Commissioner shall take such corrective measures as are necessary to give the aggrieved party relief in every respect from any illegal or unconstitutional requirement. This Code section is expressly made an administrative remedy and every person affected by any rule, regulation, or act of the Commissioner is required to exhaust this remedy before pursuing any other remedy, provided that nothing contained in this chapter shall be construed to deny any applicant for a license any existing right to a review by the court of the Commissioner's action as now provided by law. (Ga. L. 1952, p. 184, § 8; Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

ALR. — Hearsay in proceeding for suspension or revocation of license to conduct business or profession, 142 ALR 1388.

4-6-9. Injunctions.

In addition to the remedies provided in this chapter and notwithstanding the existence of an adequate remedy at law, the Commissioner is authorized to apply to the superior courts of this state for injunctions. Such courts shall have the jurisdiction, for good cause shown, to grant temporary or permanent injunctions or temporary restraining orders restraining or enjoining any person, firm, corporation, or association from violating or continuing to violate this chapter or any rule or regulation promulgated pursuant to this chapter. Such injunction or order shall be issued without bond and may be granted notwithstanding the fact that the violation constitutes a criminal act and notwithstanding the pendency of any criminal

prosecution for the same violation. (Ga. L. 1972, p. 745, § 2; Ga. L. 1983, p. 1161, § 1.)

4-6-10. Penalty for violations of chapter or rules or regulations.

(a) Any dealer, broker, or livestock market operator who violates any of the provisions of this chapter, any quarantine provision, or any rule or regulation established by the Commissioner under the authority of this or any other law for the protection of the general public in the prevention of livestock diseases shall be guilty of a misdemeanor.

(b) Any dealer, broker, or livestock market operator who violates Code Section 4-6-5, relating to maintenance of records, for a third or subsequent time shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed \$10,000.00 or by imprisonment for not less than one nor more than three years, or both, and any person so convicted shall have any license issued under this article permanently revoked and shall be ineligible to apply for a subsequent license under this article.

(c) Any dealer, broker, or livestock market operator who violates Code Section 4-6-2, relating to the sale, auction, or transfer of known infected livestock, or Code Section 4-6-6, relating to quarantines, for the third or subsequent time shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed \$10,000.00 or by imprisonment for not less than one nor more than three years, or both, and any person so convicted shall have any license issued under this article permanently revoked and shall be ineligible to apply for a subsequent license under this article. (Ga. L. 1952, p. 184, § 7; Ga. L. 1983, p. 1161, § 1; Ga. L. 1985, p. 704, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 32, 33. **C.J.S.** — 3A C.J.S., Animals, § 92.

4-6-11. Liability of purchaser or seller of leased livestock to owner or lessor of livestock.

A person who purchases leased livestock from or a commission merchant who sells leased livestock for the lessee of such livestock shall not be liable to the owner or lessor of such livestock unless the livestock are clearly marked or branded with a mark or brand registered by the owner or lessor with the department and, prior to the purchase or sale, the purchaser or commission merchant has received written notice of the owner's or lessor's ownership interest in such livestock and of the owner's or lessor's mark or brand. (Code 1981, § 4-6-11, enacted by Ga. L. 1991, p. 752, § 1; Ga. L. 1992, p. 1642, § 1.)

ARTICLE 2

CUSTODIAL ACCOUNTS FOR LIVESTOCK SELLERS

4-6-20. Short title.

This article may be cited as the "Custodial Account for Livestock Sellers Act." (Ga. L. 1966, p. 350, § 1; Ga. L. 1983, p. 1161, § 1.)

4-6-21. Maintenance of custodial accounts; deposits; commingling of funds.

Every operator of a sales establishment for the sale of livestock at auction shall maintain a custodial account in a national or state-chartered bank located in this state and within 100 miles of the sales establishment. Every such operator shall deposit in such account the gross proceeds received from the sale of livestock handled on a commissioned or agency basis, which account shall be designated "Custodial Account for Shippers' Proceeds." Other funds of the depositor shall not be commingled in such account with funds required to be deposited in this account. (Ga. L. 1966, p. 350, § 2; Ga. L. 1983, p. 1161, § 1; Ga. L. 1984, p. 22, § 4.)

4-6-22. Payments from custodial accounts.

No check shall be drawn on the custodial account nor any funds withdrawn from the account, except for payment of proceeds due the livestock seller or for legally authorized fees or charges incurred by or owing to the sales establishment. No bank holding such an account shall pay a check on such account or honor a withdrawal from such account unless the sales establishment files a certificate that the check or withdrawal is for one of the purposes authorized in this Code section. The certificate may be printed on the face of the check above the signature. (Ga. L. 1966, p. 350, § 3; Ga. L. 1983, p. 1161, § 1.)

4-6-23. Penalty for failure to deposit proceeds of sale in custodial account.

Failure to deposit the proceeds received from the sale of livestock in a custodial account as required by Code Section 4-6-21, misuse of such funds, or payment by a bank of funds held in a custodial account without the certificate required by Code Section 4-6-22 shall constitute a misdemeanor. (Ga. L. 1966, p. 350, § 4; Ga. L. 1983, p. 1161, § 1.)

ARTICLE 3

LIVESTOCK AUCTIONS

Cross references. — Making of implied warranties by companies auctioning cattle, hogs, and sheep, § 11-2-316. Sales by auction generally, § 11-2-328. Auctions of wild ani-

imals, § 27-5-11. Regulation of business of auctioneers generally, Ch. 6, T. 43.

Administrative rules and regulations. — Licensing and bonding requirements, Offi-

cial Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-7.

RESEARCH REFERENCES

ALR. — Withdrawal of property from auction sale, 37 ALR2d 1049.

4-6-40. Definitions.

Reserved. Repealed by Ga. L. 1983, p. 1161, § 1, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1956, p. 501, § 1.

4-6-41. Administration of chapter; promulgation of rules and regulations.

Reserved. Repealed by Ga. L. 1983, p. 1161, § 1, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1956, p. 501, § 7.

4-6-42. Surety bond — Generally.

(a) No person shall operate a sales establishment for the sale of livestock at auction unless he has then in force a bond in an amount calculated as follows:

(1) If the annual sales of the establishment are \$2,600,000.00 or less, the amount of the bond shall be one fifty-second of the amount of annual sales but not less than \$10,000.00; or

(2) If the annual sales of the establishment are more than \$2,600,000.00, the amount of the bond shall be \$50,000.00 plus one fifty-second of the amount of annual sales in excess of \$2,600,000.00 times a factor of 0.20.

(b) An amount calculated under subsection (a) of this Code section, if not a multiple of \$5,000.00, shall be rounded to nearest higher multiple of \$5,000.00. (Ga. L. 1956, p. 501, § 2; Ga. L. 1958, p. 309, § 1; Ga. L. 1959, p. 296, § 1; Ga. L. 1982, p. 1804, § 2; Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d, Auctions & Auctioneers, § 5.

C.J.S. — 7 C.J.S., Auctions & Auctioneers, §§ 7, 16.

ALR. — Validity of statute or ordinance

which requires liability or indemnity insurance or bond as condition of license for conducting business or profession, 120 ALR 950.

4-6-43. Surety bond — Dealers and brokers generally.

(a) No dealer or broker shall purchase livestock at any sales establishment or directly from producers unless he has then in force a bond in an amount calculated as follows:

(1) Determine a number which is the number of days during the preceding year on which the dealer or broker did business;

(2) Divide the total dollar value of livestock purchased by the dealer or broker during the preceding year by the lesser of:

(A) One-half of the number determined under paragraph (1) of this subsection; or

(B) One hundred thirty; and

(3) Adjust the amount obtained under paragraph (2) of this subsection as follows:

(A) If the amount obtained under paragraph (2) of this subsection is \$10,000.00 or less then the amount of the bond shall be \$10,000.00;

(B) If the amount obtained under paragraph (2) of this subsection is more than \$10,000.00 but not more than \$75,000.00 then that amount shall be the amount of the bond; or

(C) If the amount obtained under paragraph (2) of this subsection is more than \$75,000.00 then the amount of the bond shall be the sum of \$75,000.00 plus 10 percent of the amount by which the amount obtained under paragraph (2) of this subsection exceeds \$75,000.00.

(b) An amount calculated under subsection (a) of this Code section, if not a multiple of \$5,000.00, shall be rounded up to the nearest multiple of \$5,000.00.

(c) This Code section shall not be applicable to nor shall a bond be required of a dealer who purchases livestock at sales establishments for cash only. No livestock market operator shall permit a dealer or broker who is not properly licensed and bonded to purchase livestock other than for cash. (Ga. L. 1956, p. 501, § 3; Ga. L. 1958, p. 309, § 2; Ga. L. 1959, p. 296, § 2; Ga. L. 1970, p. 530, § 1; Ga. L. 1982, p. 1804, § 3; Ga. L. 1983, p. 1161, § 1; Ga. L. 1984, p. 22, § 4.)

Editor's notes. — The 1984 amendment, effective February 3, 1984, directed that "One hundred thirty" be substituted for "130" in subparagraph (a)(1)(B). The Act

should have directed that the change be made in subparagraph (a)(2)(B) instead, and this Code section has been edited accordingly.

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Intent and purpose of section. — It was not the intent and purpose of the livestock bonding law to supersede or alter any arrangements that might be made between the seller and buyer to satisfy payment of the purchase price; there is still the basic duty of the seller to satisfy himself that the purchaser can pay for the livestock purchased. 1958-59 Op. Att'y Gen. p. 3.

The Department does not have the authority to require a bond in excess of the

amounts provided herein. 1958-59 Op. Att'y Gen. p. 3.

Bond requirement as condition precedent to purchase livestock at auction. — There is nothing in this section or § 4-6-3 to prohibit the individual operator of a livestock auction from requiring a bond or such other security that the operator may require as a condition of permitting the buyer to purchase livestock at the auction. 1958-59 Op. Att'y Gen. p. 3.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bonds, §§ 4, 26.

C.J.S. — 11 C.J.S., Bonds, § 25.

4-6-44. Surety bond — Annual sales and purchases.

In calculating amounts of bonds under Code Sections 4-6-42 and 4-6-43, the total amount of annual sales or annual purchases for the preceding calendar year shall be used; but, if an applicant for a license does not have an annual sales history, the Commissioner shall estimate the amount of annual sales or annual purchases which will occur. (Code 1981, § 4-6-44, enacted by Ga. L. 1983, p. 1161, § 1.)

Editor's notes. — The 1983 Act, effective July 1, 1983, repealed former Code Section 4-6-44, based on Ga. L. 1956, p. 501, § 4, and Ga. L. 1981, Ex. Sess., p. 8 (Code enactment

act), which dealt with the number of bonds required under former Code Sections 4-6-42 and 4-6-43, and enacted the present Code section.

4-6-45. Surety bond — Acceptance of insurance coverage as satisfaction of bonding requirements.

Reserved. Repealed by Ga. L. 1983, p. 1161, § 1, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1959, p. 296, § 5, and Ga. L. 1981, Ex. Sess., p. 8 (Code enactment act).

4-6-46. Maintenance of records and accounts; inspections.

Sales establishments for the sale of livestock at auction shall maintain such accounts and records as will at all times disclose the names of the sellers or consignors, the amount due and payable to each from the custodial account for shippers' proceeds, and the legally authorized fees and charges due the establishment. Sales establishments shall make such records available for inspection by the Commissioner or his agents during any business hours. (Ga. L. 1966, p. 350, § 5; Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d, Auctions & Auctioneers, §§ 2-5.

C.J.S. — 7 C.J.S., Auctions & Auctioneers, § 2.

4-6-47. When payment for livestock purchased due; disposition of proceeds; methods of payment.

Payment for livestock purchased at auction shall be made on the same date of the purchase of the livestock, except that persons regulated by the provisions of the federal Packers and Stockyards Act may make payment by placing in the mail a check on the day following the date of purchase. The proceeds from the sale of livestock shall be deposited by the livestock sales establishment in the custodial account not later than the next banking day following the date of sale or receipt of payment by mail. Payment for livestock purchased at auction shall be made by cash, check, draft, or transfer of funds by wire. No loans shall be made from the custodial account of any livestock sales establishment to any purchaser of livestock at that sales establishment. (Ga. L. 1971, p. 71, § 1; Ga. L. 1978, p. 2061, § 1; Ga. L. 1983, p. 1161, § 1.)

U.S. Code. — The Packers and Stockyards Act, referred to in this section, is codified as 7 U.S.C. § 181 et seq.

Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-11.

Administrative rules and regulations. — Payment for livestock purchased at auction,

4-6-48. Report of dishonor of a check or draft issued in payment for livestock.

It shall be the duty and responsibility of each livestock sales establishment to report to the Commissioner within 24 hours after having knowledge that a check or draft issued in payment for livestock has been dishonored; and it shall be the duty and responsibility of the Commissioner to notify all licensed sales establishments of the fact of such dishonor of any such check or draft issued in payment for livestock. (Ga. L. 1971, p. 71, § 2; Ga. L. 1983, p. 1161, § 1.)

Administrative rules and regulations. — Payment for livestock purchased at auction, Official Compilation of Rules and Regula-

tions of State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-11.

4-6-49. Annual reports of sales and purchases; proof of compliance with bonding requirements.

It shall be the duty of each sales establishment to report to the Commissioner not later than March 31 of each year the total sales of such establishment for the preceding calendar year. It shall be the duty of each dealer to report to the Commissioner not later than March 31 of each year

the total purchase of such dealer for the preceding calendar year. The Commissioner may prescribe the form of such reports. At the time the report is made, each sales establishment and dealer shall submit proof to the Commissioner of compliance with the bonding requirements of this chapter. The failure to submit the information required in this Code section shall be sufficient grounds to revoke the license of any such sales establishment or dealer. (Ga. L. 1959, p. 296, § 4; Ga. L. 1983, p. 1161, § 1.)

4-6-49.1. Denial of licenses; Commissioner's right to require disclosures and examine records and accounts; dealers purchasing livestock for cash only; financial statement.

(a) No license shall be issued to or allowed to be maintained by any sales establishment or dealer if:

(1) Any beneficial interest in the business of the sales establishment or dealer is directly or indirectly owned by a defaulter; or

(2) Any defaulter is employed in a management position by the sales establishment or dealer.

(b) As used in this Code section, the term "defaulter" means any person who has within the past five years been employed in a managerial position by or owned any beneficial interest in the business of a sales establishment or dealer which business has ceased operations without satisfying all liabilities of the business either from assets of the business or from any bond or bonds.

(c) The Commissioner shall have full authority to require disclosure from licensees and applicants of information sufficient to determine whether the licensee or applicant is qualified to be licensed under this Code section. The Commissioner shall have full authority to examine the records and accounts of all licensees in order to determine whether any proceeds of the business are being paid to any defaulter.

(d) This Code section shall not prohibit the Commissioner from allowing a defaulter to operate as a dealer who purchases livestock for cash only.

(e) All applicants for licensure shall submit to the Commissioner a current financial statement; and all licensees shall submit a current financial statement annually. (Code 1981, § 4-6-49.1, enacted by Ga. L. 1982, p. 1804, § 4; Ga. L. 1983, p. 1161, § 1.)

Cross references. — For further provisions regarding powers of Commissioner relating to sale of livestock at auction, see § 10-2-52.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Code Sections 4-6-40 and 4-6-41 are included in the annotations for this section.

Obligation of commissioner as trustee under terms of bond. — Under the terms of the bond required by former § 4-6-40, which named the Commissioner as trustee, it obligated him where there was a default in its provisions to collect the bond or any necessary part thereof to pay the claim of any person from whom the principal had purchased livestock and failed to pay for the same; or where the aggregate claims of several similarly situated exceeded the amount of the bond to collect it in full and disburse the proceeds pro rata among several claimants. *Campbell v. Benton*, 217 Ga. 368, 122 S.E.2d 223 (1961).

Bond is purely statutory. — The bond dealt with in this section is purely and strictly a statutory one — a bond which a livestock dealer or broker is required by law to execute and deposit with Georgia's Commissioner of Agriculture before he can obtain a license or permit to deal in livestock. The validity of a bond given in compliance with a statute, and which meets the requirements of the statute is not affected or its nature changed by the inclusion in the bond of a condition that is either unauthorized or is repugnant to the statute. *Campbell v. Benton*, 217 Ga. 368, 122 S.E.2d 223 (1961).

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This section inapplicable to sale of baby chicks. — The sale of baby chicks is not subject to either this section or § 2-9-1 inasmuch as such sales are not within the provisions of these acts; no law would provide

protection for those selling baby chicks to Georgia dealers and producers insofar as a bond is concerned, specifically providing protection therefor. 1958-59 Op. Att'y Gen. p. 3.

RESEARCH REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d, Auctions & Auctioneers, §§ 1-6.

C.J.S. — 7 C.J.S., Auctions & Auctioneers, §§ 2-5.

4-6-50. Livestock weighed at sales establishment; certified public weigher.

All livestock weighed at a sales establishment shall be weighed by a certified public weigher who has complied with Article 2 of Chapter 2 of Title 10. Each such weigher shall obtain a seal and upon request shall impress the seal upon the scale ticket of the livestock weighed. (Ga. L. 1956, p. 501, § 5; Ga. L. 1958, p. 309, § 3. Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weights & Measures, §§ 20, 21.

C.J.S. — 94 C.J.S., Weights & Measures, § 6.

4-6-51. Isolation of employees of sales establishments during conduct of sale.

Each sales establishment shall make adequate provision to isolate, insofar as practicable, the auctioneer, weigher, clerk, and any other employee who has any duty in regard to making any record of the sale. No person shall be permitted to converse with any such employee while the employee is performing any duty in connection with the sale. (Ga. L. 1956, p. 501, § 6; Ga. L. 1983, p. 1161, § 1.)

4-6-52. Special sales.

(a) As used in this Code section, "special sale" means any livestock sale, except a regular sale at an establishment and any sale by a farmer of livestock owned by the farmer, with payment made directly to the farmer.

(b) The Commissioner is authorized to prescribe rules and regulations for the operation of special sales. No person shall hold a special sale without obtaining a permit therefor from the Commissioner or his duly authorized representative, which shall be granted without charge upon submission of proof satisfactory to the Commissioner that the person applying for the permit is bonded in an amount equal to one-fourth of the anticipated proceeds of the sale; provided, however, such bond shall be not less than \$10,000.00 and not more than \$150,000.00 in amount.

(c) Associations holding sales of animals consigned by members of the association only shall not be required to procure a bond if the directors of the association accept full responsibility for financial obligations of sale and release the Commissioner, in writing, from any responsibility.

(d) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1959, p. 296, § 6; Ga. L. 1978, p. 1467, § 1; Ga. L. 1982, p. 1804, § 5; Ga. L. 1983, p. 1161, § 1.)

Administrative rules and regulations. — Georgia Department of Agriculture, Chapter 40-13-5.
Special sales, Official Compilation of Rules and Regulations of State of Georgia, Rules of

4-6-53. Injunctions.

Reserved. Repealed by Ga. L. 1983, p. 1161, § 1, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1959, p. 296, § 3.

4-6-54. Use of persuader in loading or handling of livestock.

It shall be unlawful for any person to use any persuader other than an electric prod or canvas flap in the loading or handling of livestock in a public sales establishment. (Ga. L. 1959, p. 172, § 1; Ga. L. 1983, p. 1161, § 1.)

4-6-55. Penalty for violation of chapter or rules or regulations promulgated thereunder.

Repealed by Ga. L. 1983, p. 1161, § 1, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1956, p. 501, § 8.

CHAPTER 7

HATCHERY OPERATORS AND DEALERS

Sec.		Sec.	
4-7-1.	Designation of official state agency for administration of national improvement plans; participation by hatcheries and the like in national plans sponsored by United States Secretary of Agriculture; establishment of state plan of identification of hatcheries, dealers, or supply flocks; use of certain words in advertising or offering of hatching eggs, chicks, poults, or breeding stock.	4-7-5.	Use of sulfaguanidine and sulfathiazole.
4-7-2.	Pullorum disease control.	4-7-6.	Shipments of hatching eggs, chicks, poults, poultry breeding stock, or birds of any species into state.
4-7-3.	Licenses.	4-7-7.	Effect of chapter on Commissioner's authority to control and eradicate livestock and poultry diseases.
4-7-4.	Reports of contagious diseases; inspection of premises.	4-7-8.	Penalty for violations of chapter; disposal of hatching eggs or birds not in compliance with chapter.

Cross references. — Regulation of sales of eggs, § 26-2-260 et seq.

Administrative rules and regulations. — Poultry processing, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-10-2. Poultry flock, hatchery and

dealer regulations, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-10-03.

Law reviews. — For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986).

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Enforcement of chapter not infringement of any constitutional right. — Enforcement of this chapter will operate on all persons alike and will not infringe upon any right

guaranteed any person under the Constitution of Georgia or under the Constitution of the United States. 1945-47 Op. Att'y Gen. p. 15.

4-7-1. Designation of official state agency for administration of national improvement plans; participation by hatcheries and the like in national plans sponsored by United States Secretary of Agriculture; establishment of state plan of identification of hatcheries, dealers, or supply flocks; use of certain words in advertising or offering of hatching eggs, chicks, poults, or breeding stock.

(a) The Georgia Poultry Improvement Association, Inc., shall be recognized and designated as the official state agency for administration of the National Poultry Improvement Plan sponsored by the secretary of agriculture, United States Department of Agriculture. Participation in the National Poultry Improvement Plan by hatcheries, breeders, dealers, and supply

flock owners shall be voluntary and administrated and governed by the rules and regulations of the official state agency in conjunction with rules and regulations promulgated by the secretary of agriculture, United States Department of Agriculture.

(b) Nothing in this chapter shall be construed to establish a state plan of identification of hatcheries, dealers, or supply flocks, except as specified in this chapter.

(c) The words "state approved," "state tested," or words or phrases of similar implication and meaning shall not be used in advertising or in the sale or offering for sale of hatching eggs, chicks, poults, or breeding stock. (Ga. L. 1946, p. 147, § 1.)

4-7-2. Pullorum disease control.

(a) Regulations for control and eradication of pullorum disease shall be made following a joint hearing between the Commissioner and the Georgia Poultry Improvement Association, Inc. Requirements for pullorum disease testing and other sanitary measures shall be set by the Commissioner. In the event that state regulations do not exist or apply, the minimum pullorum disease control regulations of the Georgia Poultry Improvement Association, Inc., shall be effective.

(b) The Commissioner shall be authorized to quarantine and prohibit the sale or shipment of hatching eggs, chicks, poults, poultry breeding stock, or birds of any species to or from any hatchery, dealer, or flock or in any area within the state. The Commissioner shall be authorized to promulgate special regulations for prevention and spread of pullorum disease or other infectious or contagious diseases of poultry.

(c) Appointment of qualified pullorum disease testing agents and supervision of their field work shall be made by the Commissioner. Only persons who have demonstrated that they are capable of doing satisfactory testing work shall be so authorized. (Ga. L. 1946, p. 147, § 2.)

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Notice of shipment conditions by Commissioner. — The Commissioner can give notice to any carrier to whom consignments of eggs, chicks, or poultry are made for shipment into this state of the conditions under which Georgia will permit these shipments to be made, and any carrier who accepts for shipment and ships into this state, hatching eggs, chicks, or poultry in violation of these rules or regulations would

be guilty of a misdemeanor. 1945-47 Op. Att'y Gen. p. 15.

Mandatory compliance with rules and regulations of commissioner. — A hatchery which does not voluntarily abide by the rules and regulations of the Georgia Poultry Improvement Association must abide by the rules and regulations of the Commissioner of Agriculture. 1957 Op. Att'y Gen. p. 2.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 32, 33. **C.J.S.** — 3A C.J.S., Animals, §§ 67, 73.

4-7-3. Licenses.

(a) Every person, firm, corporation, or dealer who operates a hatchery shall first register and secure a permanent license from the Commissioner. The fee for such permanent license shall be fixed by the Commissioner in an amount not to exceed \$10.00 for each hatchery, dealer, or branch. The license shall be conspicuously displayed in each place of business. The license shall not be transferable. When any condition is revealed to exist which is not in strict accord with this chapter, the license may be revoked or suspended by the Commissioner, in his discretion.

(b) Manufacturers of poultry remedies, before offering for sale each of such remedies in the state for treatment, eradication, or control of poultry diseases, shall first secure a license from and be approved by the Commissioner, at his discretion. The fee for such license shall be \$1.00 for each remedy. (Ga. L. 1946, p. 147, § 3; Ga. L. 1969, p. 856, § 1.)

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All hatcheries are required to register and secure a license from the Commissioner. 1957 Op. Att'y Gen. p. 2.

Mandatory compliance with rules and regulations. — A hatchery which does not vol-

untarily abide by the rules and regulations of the Georgia Poultry Improvement Association must abide by the rules and regulations of the Commissioner of Agriculture. 1957 Op. Att'y Gen. p. 2.

RESEARCH REFERENCES

ALR. — Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

4-7-4. Reports of contagious diseases; inspection of premises.

(a) Hatcheries, dealers, and flock owners shall promptly report to the Commissioner the outbreak of any contagious or infectious disease affecting chicks, poults, or breeding stock in their possession or in any flock producing hatching eggs.

(b) The premises and equipment of hatcheries and dealers shall be subject to inspection by the Commissioner; and access to any supply flock shall be granted to the inspectors of the department at any reasonable time during the business day to see that minimum requirements of sanitary and disease control regulations are maintained and enforced. (Ga. L. 1946, p. 147, § 4.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32. C.J.S. — 3A C.J.S., Animals, § 67.

4-7-5. Use of sulfaguanidine and sulfathiazole.

(a) It shall be lawful in this state for any recognized poultry flock owners to buy and use sulfaguanidine and sulfathiazole in original packages in powdered form only for their own requirements in the treatment of poultry diseases. Dealers in poultry supplies may buy and sell sulfaguanidine and sulfathiazole.

(b) No person, firm, or corporation in this state shall sell or offer for sale sulfaguanidine or sulfathiazole unless each is plainly labeled with the words "For Poultry Only." (Ga. L. 1946, p. 135, §§ 1, 2.)

Cross references. — Use of drugs of the sulfanilamide or sulfonamide group for use in control of poultry diseases, § 26-4-6.

4-7-6. Shipments of hatching eggs, chicks, poults, poultry breeding stock, or birds of any species into state.

(a) Hatching eggs, chicks, poults, poultry breeding stock, or birds of any species shall not be shipped into the State of Georgia without first obtaining the approval of the Commissioner. Shippers shall be subject to investigation by the Commissioner or other authorized person to determine that hatching eggs, chicks, poults, or poultry breeding stock have been produced and handled under conditions no less adequate for control of pullorum disease and other contagious or infectious diseases of poultry than those required under Georgia regulations.

(b) Hatching eggs, chicks, poults, or poultry breeding stock shipped into the State of Georgia shall be:

(1) Reported by the shipper to the Commissioner on official health certificates signed by the livestock sanitary official in the state of origin, certifying that such shipment has met requirements equivalent to Georgia regulations for control of pullorum disease and other contagious or infectious diseases of poultry; a duplicate copy of the health certificate shall be attached to the waybill on each shipment; or

(2) Reported to the Commissioner on official National Poultry Improvement Plan forms, if produced under a pullorum disease control phase of the National Poultry Improvement Plan. (Ga. L. 1946, p. 147, § 5.)

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Duplicate copy of health certificate required. — Under this section, it is the duty of the carrier to whom shipments of poultry are consigned for delivery in Georgia to require a duplicate copy of the health certificate of the state of origin of such poultry and such duplicate certificate must be attached to the waybill on each shipment, and the Department of Agriculture, through its properly delegated agents, has authority to stop at the borders of Georgia any shipment seeking to come into this state without such

duplicate certificate. 1945-47 Op. Att'y Gen. p. 15.

Prohibition of shipment for failure to supply compliance certification. — The Commissioner may prohibit the shipment of hatching eggs and poultry into the state unless accompanied by a certificate of the proper official of the state of origin that the shipment has met the requirements of the Georgia statute and regulations for the control of diseases of poultry. 1945-47 Op. Att'y Gen. p. 15.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 33.

C.J.S. — 3A C.J.S., Animals, § 67.

4-7-7. Effect of chapter on Commissioner's authority to control and eradicate livestock and poultry diseases.

Nothing in this chapter shall be construed so as to limit in any manner the authority of the Commissioner to carry out, administer, and enforce all laws, rules, and regulations for the control and eradication of livestock and poultry diseases in this state. (Ga. L. 1946, p. 147, § 6.)

4-7-8. Penalty for violations of chapter; disposal of hatching eggs or birds not in compliance with chapter.

Any person, firm, or corporation found to be in violation of this chapter is guilty of a misdemeanor. The Commissioner may, at his discretion, confiscate, destroy, or otherwise dispose of all hatching eggs, chicks, poults, poultry breeding stock, or birds of any species that are produced in the state or enter the state but are not in compliance with this chapter. (Ga. L. 1946, p. 147, § 7.)

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Destruction or disposal of hatching eggs or birds. — The Commissioner of Agriculture or his duly authorized agent has authority to destroy or otherwise dispose of all hatching eggs, chicks, poultry, poultry breeding stock or birds of any species that are produced in the state or that enter the state not in compliance with the chapter or the rules and regulations thereunder. 1945-47 Op. Att'y Gen. p. 15.

Instigation of criminal proceedings by Commissioner or agent. — Under this section, any person, whether shipper, carrier, or a person within this state who has possession of diseased poultry, who is found guilty of violating any of the provisions of this chapter for the control of diseases of poultry, shall be subject to misdemeanor punishment; the proper authority to instigate such criminal proceedings being the Commissioner of Ag-

riculture of Georgia or one of his duly authorized agents. 1945-47 Op. Att'y Gen. p. 15.

Notice by Commissioner of shipping conditions. — The Commissioner of Agriculture can give notice to any carrier to whom consignments of eggs, chicks, or poultry are made for shipment into this state of the

conditions under which Georgia will permit these shipments to be made and any carrier who accepts for shipment and ships into this state, hatching eggs, chicks, or poultry in violation of these rules or regulations would be guilty of a misdemeanor. 1945-47 Op. Att'y Gen. p. 15.

CHAPTER 8

DOGS

Article 1		Sec.	
General Provisions			
Sec.			
4-8-1.	Abandonment of dead dogs — Upon private property.		ments; joint dog control services; dog control officer; animal control board or local board of health to hold hearings.
4-8-2.	Abandonment of dead dogs — Upon public property or public right of way.	4-8-23.	Investigations by dog control officer; notice of classification as dangerous dog.
4-8-3.	Abandonment of dogs.	4-8-24.	Procedures for classification as dangerous dogs or potentially dangerous dogs; notice; hearing.
4-8-4.	Liability of owner or custodian for damages done to livestock or poultry by dog.	4-8-25.	Requirements for possessing dangerous or potentially dangerous dog.
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Cross references. — Hunting with dogs, §§ 27-3-16 through 27-3-18. Equality of access to public accommodations and facilities by blind persons accompanied by guide dogs, §§ 30-4-1, 30-4-2. Control of rabies, Ch. 19, T. 31.

RESEARCH REFERENCES

ALR. — Constitutionality of “dog laws,” 49 ALR 847.
Who “harbors” or “keeps” dog under animal liability statute, 64 ALR4th 963.
Landlord’s liability to third person for injury resulting from attack off leased premises by dangerous or vicious animal kept by tenant, 89 ALR4th 374.

ARTICLE 1

GENERAL PROVISIONS

4-8-1. Abandonment of dead dogs — Upon private property.

No person shall intentionally abandon a dead dog on any private property belonging to another unless the person so doing shall have first obtained permission from the owner of the property on which the dog is

being left and the provisions of Code Section 4-5-3 are complied with in full. (Ga. L. 1969, p. 831, § 1.)

Cross references. — Solid waste management, § 12-8-20 et seq.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 26.

C.J.S. — 3A C.J.S., Animals, § 2. 66 C.J.S., Nuisances, § 32.

ALR. — Validity and construction of statute, ordinance, or regulation applying to specific dog breeds, such as "pit bulls" or "bull terriers", 80 ALR4th 70.

4-8-2. Abandonment of dead dogs — Upon public property or public right of way.

No person shall abandon a dead dog on any public property or public right of way unless the place in which the dog is being left is a public dump or other facility designed for receiving such and has been designated by the local governmental authorities as a public facility for receiving trash or refuse and the provisions of Code Section 4-5-3 are complied with in full. (Ga. L. 1969, p. 831, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 26.

C.J.S. — 3A C.J.S., Animals, § 2. 66 C.J.S., Nuisances, § 32.

4-8-3. Abandonment of dogs.

No person shall release a dog on any property, public or private, with the intention of abandoning the dog. (Ga. L. 1969, p. 831, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 48.

C.J.S. — 3A C.J.S., Animals, § 288.

4-8-4. Liability of owner or custodian for damages done to livestock or poultry by dog.

(a) The owner or, if no owner can be found, the custodian exercising care and control over any dog which goes upon the land of another and causes injury, death, or damage directly or indirectly to any livestock or poultry shall be civilly liable to the owner of the livestock or poultry for damages, death, or injury caused by the dog. The liability of the owner or custodian of the dog shall include consequential damages.

(b) This Code section is to be considered cumulative of other remedies provided by law. There is no intent to do away with or limit other causes of

action which might inure to the owner of any livestock or poultry. (Ga. L. 1969, p. 831, § 4.)

Cross references. — For further provisions regarding liability of owner of dog which kills or injures livestock, see § 51-2-6.

Law reviews. — For survey of develop-

ments in Georgia torts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 247 (1981).

JUDICIAL DECISIONS

Situation where a trespassing dog kills or injures another domestic animal is specifically covered by this section. *Kiser v. Morris*, 156 Ga. App. 224, 274 S.E.2d 610 (1980).

Knowledge by owner of a vicious or dangerous propensity of his dog. — The rule as to scienter, or knowledge on the part of the owner of a vicious or dangerous propensity of his dog, if one exists, has no application in view of the provisions of this section. *Sullivan v. Goss*, 133 Ga. App. 217, 210 S.E.2d 366 (1974).

The rule as to scienter, or knowledge on the part of the owner of a vicious or dangerous propensity of the dog, if one exists, has no application where this section does. *Kiser v. Morris*, 156 Ga. App. 224, 274 S.E.2d 610 (1980).

If a dog is wrongfully in the place where he does the mischief, the owner is liable, irrespective of prior knowledge by the owner of the dog's dangerous proclivities. *Kiser v.*

Morris, 156 Ga. App. 224, 274 S.E.2d 610 (1980).

A dog is a domestic animal and the owner of a domestic animal is liable if such animals are wrongfully in the place where they do mischief even if the owner does not have notice. *Kiser v. Morris*, 156 Ga. App. 224, 274 S.E.2d 610 (1980).

Fight in public road. — In an action to recover damages for injuries inflicted upon plaintiff's dog when it was attacked by defendant's dog, it was necessary for the plaintiff to prove that the owner of the dog knew of the dog's propensity to do the particular act which caused injury to the complaining party, since the fight was initiated in the public road and upon an easement adjoining defendant's house and culminated in defendant's front yard, which areas were not considered the "land of another." *Mintz v. Frazier*, 160 Ga. App. 668, 288 S.E.2d 24 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 94 et seq.

C.J.S. — 3A C.J.S., Animals, § 186 et seq.

ALR. — Liability for killing dog to protect domestic animal or fowl, 10 ALR 689.

Liability for damages due to dog interfering with travel in highway, 11 ALR 270.

Liability of owner or occupant of premises for injury to person thereon by dog not owned or harbored by former, 92 ALR 732.

Validity, construction, and effect of statute eliminating scienter as condition of liability for injury by dog or other animal, 142 ALR 436.

Liability for injury inflicted by horse, dog, or other domestic animal exhibited at show, 80 ALR2d 886.

Dog owner's liability for damages from motor vehicle accident involving attempt to avoid collision with dog on highway, 41 ALR3d 888.

Personal injuries inflicted by animal as within homeowner's or personal liability policy, 96 ALR3d 891.

Liability for injuries inflicted by dog on public officer or employee, 74 ALR4th 1120.

4-8-5. Cruelty to dogs; authorized killing of dogs.

(a) No person shall perform a cruel act on any dog; nor shall any person harm, maim, or kill any dog, or attempt to do so, except that a person may:

(1) Defend his person or property, or the person or property of another, from injury or damage being caused by a dog; or

(2) Kill any dog causing injury or damage to any livestock or poultry.

(b) The method used for killing the dog shall be designed to be as humane as is possible under the circumstances. A person who humanely kills a dog under the circumstances indicated in subsection (a) of this Code section shall incur no liability for such death.

(c) This Code section shall not be construed to limit in any way the authority or duty of any law enforcement officer, dog or rabies control officer, humane society, or veterinarian. (Ga. L. 1969, p. 831, § 5.)

Cross references. — Destroying or injuring police dog, § 16-11-107. Cruelty to animals generally, § 16-12-4. Duty of conservation rangers to kill dogs pursuing or killing deer, § 27-3-49.

JUDICIAL DECISIONS

Conditions justifying killing. — To justify extreme penalty of killing a dog in defense of self, family, or property, or person or property of another, such danger must be imminent, and a real or obviously apparent necessity must exist, and the threatened

injury could not otherwise have been prevented. *Readd v. State*, 164 Ga. App. 97, 296 S.E.2d 402 (1982).

Cited in *Spivey v. Eavenson*, 150 Ga. App. 429, 258 S.E.2d 54 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 27-30.

C.J.S. — 3A C.J.S., Animals, § 99 et seq.

ALR. — Presence of owner as affecting liability for killing trespassing dog, 42 ALR 437.

Dogs as subject of larceny, 92 ALR 212.

Right of action for negligently killing or injuring dog as affected by statutes relating to dogs, 134 ALR 705.

Liability for killing or injuring unlicensed or untagged dog, 145 ALR 993.

Civil liability of landowner for killing or injuring trespassing dog, 15 ALR2d 578.

Privilege to kill or injure nontrespassing licensed dog to defend third person from harm or attack by animal, 74 ALR2d 770.

What constitutes statutory offense of cruelty to animals, 82 ALR2d 794.

What constitutes offense of cruelty to animals—modern cases, 6 ALR5th 733.

4-8-6. Permitting dogs in heat to roam or run free.

No owner or custodian of any dog in heat shall permit the dog to roam or run free beyond the limits of his property. (Ga. L. 1969, p. 831, § 6.)

RESEARCH REFERENCES

ALR. — Liability of owner of male animal who furnishes its service for breeding purposes, for damage inflicted during such services, 106 ALR 1418.

4-8-7. Penalty for violations of article.

Any person who violates any provision of this article shall be guilty of a misdemeanor. (Ga. L. 1969, p. 831, § 7; Ga. L. 1988, p. 824, § 1.)

ARTICLE 2**DANGEROUS DOG CONTROL****RESEARCH REFERENCES**

ALR. — Liability for injuries caused by cat,
68 ALR4th 823.

4-8-20. Short title.

This article shall be known and may be cited as the “Dangerous Dog Control Law.” (Code 1981, § 4-8-20, enacted by Ga. L. 1988, p. 824, § 2.)

4-8-21. Definitions.

(a) As used in this article, the term:

(1) “Dangerous dog” means any dog that, according to the records of an appropriate authority:

(A) Inflicts a severe injury on a human being without provocation on public or private property at any time after March 31, 1989; or

(B) Aggressively bites, attacks, or endangers the safety of humans without provocation after the dog has been classified as a potentially dangerous dog and after the owner has been notified of such classification.

(2) “Dog control officer” means an individual selected by a local government pursuant to the provisions of subsection (c) of Code Section 4-8-22 to aid in the administration and enforcement of the provisions of this article.

(3) “Governing authority” means the governing body or official in which the legislative powers of a local government are vested.

(4) “Local government” means any county or municipality of this state.

(5) “Owner” means any natural person or any legal entity, including, but not limited to, a corporation, partnership, firm, or trust owning, possessing, harboring, keeping, or having custody or control of a dangerous dog or potentially dangerous dog within this state.

(6) "Potentially dangerous dog" means any dog that without provocation bites a human being on public or private property at any time after March 31, 1989.

(7) "Proper enclosure" means an enclosure for keeping a dangerous dog or potentially dangerous dog while on the owner's property securely confined indoors or in a securely enclosed and locked pen, fence, or structure suitable to prevent the entry of young children and designed to prevent the dog from escaping. Any such pen or structure shall have secure sides and a secure top, and, if the dog is enclosed within a fence, all sides of the fence shall be of sufficient height and the bottom of the fence shall be constructed or secured in such a manner as to prevent the dog's escape either from over or from under the fence. Any such enclosure shall also provide protection from the elements for the dog.

(8) "Records of an appropriate authority" means records of any state, county, or municipal law enforcement agency; records of any county or municipal animal control agency; records of any county board of health; records of any federal, state, or local court; or records of a dog control officer provided for in this article.

(9) "Severe injury" means any physical injury that results in broken bones or disfiguring lacerations requiring multiple sutures or cosmetic surgery or a physical injury that results in death.

(b) A dog that inflicts an injury upon a person when the dog is being used by a law enforcement officer to carry out the law enforcement officer's official duties shall not be a dangerous dog or potentially dangerous dog within the meaning of this article. A dog shall not be a dangerous dog or a potentially dangerous dog within the meaning of this article if the injury inflicted by the dog was sustained by a person who, at the time, was committing a willful trespass or other tort or was tormenting, abusing, or assaulting the dog or had in the past been observed or reported to have tormented, abused, or assaulted the dog or was committing or attempting to commit a crime. (Code 1981, § 4-8-21, enacted by Ga. L. 1988, p. 824, § 2; Ga. L. 1989, p. 159, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1989, a comma was inserted following "including" near the beginning of paragraph (5) of subsection (a) of this Code section.

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 143 (1989).

RESEARCH REFERENCES

ALR. — Intentional provocation, contributory or comparative negligence, or assumption of risk as defense to action for injury by dog, 11 ALR5th 127.

4-8-22. Jurisdiction of local governments; joint dog control services; dog control officer; animal control board or local board of health to hold hearings.

(a) Except as otherwise provided by subsection (b) of this Code section, a county's jurisdiction for the enforcement of this article shall be the unincorporated area of the county and a municipality's jurisdiction for such enforcement shall be the territory within the corporate limits of the municipality.

(b) Any county or municipality or any combination of such local governments may contract or enter into agreements with each other for joint dog control services or for the provision of dog control services required by this article and for the separate or joint use of personnel, facilities, and equipment used in the provision of such services.

(c) The governing authority of each local government shall designate an individual to carry out the duties of a dog control officer as provided in this article. One individual may carry out the duties of a dog control officer for more than one local government pursuant to a contract or agreement under subsection (b) of this Code section. The governing authority of a local government may assign the additional duties of dog control officer to any officer or employee of the local government who is subject to the jurisdiction of the governing authority. With the consent of the sheriff, the governing authority of a local government may assign the additional duties of dog control officer to a county sheriff or to a sheriff's deputy. With the consent of the county board of health and the rabies control officer, the governing authority of a local government may assign the additional duties of dog control officer to a rabies control officer appointed under Code Section 31-19-7. A person carrying out the duties of a dog control officer shall not be authorized to make arrests unless the person is a law enforcement officer having the powers of arrest.

(d) The governing authority of a local government may provide by ordinance or resolution for the creation of an animal control board to hold hearings provided for in Code Section 4-8-24. If such an animal control board is created, such board may hear and determine matters provided for in Code Section 4-8-24. No member of the animal control board may participate in a hearing on any matter in which such member previously participated in the classification of the dog at issue. An animal control board may be created jointly by two or more local governments under the provisions of subsection (b) of this Code section.

(e) In lieu of conducting the hearings required by Code Section 4-8-24 or creating an animal control board for such purpose as provided in subsection (d) of this Code section, the governing authority of each local government is authorized to designate the local board of health within the jurisdiction of such local government to conduct such hearings. Any board

so designated is authorized and shall have jurisdiction to conduct such hearings and determine matters provided for in Code Section 4-8-24. (Code 1981, § 4-8-22, enacted by Ga. L. 1988, p. 824, § 2.)

4-8-23. Investigations by dog control officer; notice of classification as dangerous dog.

(a) Upon receiving a report of a dangerous dog or potentially dangerous dog within a dog control officer's jurisdiction from a law enforcement agency, animal control agency, rabies control officer, or county board of health, the dog control officer shall make such investigations and inquiries with regard to such report as may be necessary to carry out the provisions of this article. Any local government shall be authorized but not required to provide by ordinance or resolution for additional duties of a dog control officer in identifying dangerous dogs or potentially dangerous dogs and their owners to carry out the provisions of this article.

(b) When a dog control officer classifies a dog as a dangerous dog or reclassifies a potentially dangerous dog as a dangerous dog, the dog control officer shall notify the dog's owner in writing by certified mail to the owner's last known address of such classification or reclassification. Such notice shall be complete upon its mailing. (Code 1981, § 4-8-23, enacted by Ga. L. 1988, p. 824, § 2; Ga. L. 1989, p. 159, § 2.)

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 143 (1989).

4-8-24. Procedures for classification as dangerous dogs or potentially dangerous dogs; notice; hearing.

(a) As applied to the owners of potentially dangerous dogs, the procedures provided for in this Code section must be carried out as a necessary condition for the enforcement of the provisions of this article against such owners. As applied to the owners of dangerous dogs, the procedures provided for in this Code section shall not be an essential element of any crime provided for in this article.

(b) When a dangerous dog or a potentially dangerous dog is classified as such, the dog control officer shall notify the dog's owner of such classification.

(c) The notice to the owner shall meet the following requirements:

(1) The notice shall be in writing and mailed by certified mail to the owner's last known address;

(2) The notice shall include a summary of the dog control officer's findings that formed the basis for the dog's classification as a dangerous or potentially dangerous dog;

(3) The notice shall be dated and shall state that the owner, within 15 days after the date shown on the notice, has a right to request a hearing on the dog control officer's determination that the dog is a dangerous dog or potentially dangerous dog;

(4) The notice shall state that the hearing, if requested, shall be before the governing authority, the board of health, or the animal control board of the respective local government and shall specify the name of the applicable agency which will conduct the hearing;

(5) The notice shall state that if a hearing is not requested, the dog control officer's determination that the dog is a dangerous dog or a potentially dangerous dog will become effective for all purposes under this article on a date specified in the notice, which shall be after the last day on which the owner has a right to request a hearing; and

(6) The notice shall include a form to request a hearing before the applicable agency and shall provide specific instructions on mailing or delivering such request to the agency.

(d) When the governing authority, animal control board, or local board of health, whichever is applicable, receives a request for a hearing as provided in subsection (c) of this Code section, it shall schedule such hearing within 30 days after receiving the request. The governing authority or board shall notify the dog owner in writing by certified mail of the date, time, and place of the hearing, and such notice shall be mailed to the dog owner at least ten days prior to the date of the hearing. At the hearing, the owner of the dog shall be given the opportunity to testify and present evidence and in addition thereto the governing authority or board shall receive such other evidence and hear such other testimony as the governing authority or board may find reasonably necessary to make a determination either to sustain, modify, or overrule the dog control officer's classification of the dog.

(e) Within ten days after the date of the hearing, the governing authority or board shall notify the dog owner in writing by certified mail of its determination on the matter. If such determination is that the dog is a dangerous dog or a potentially dangerous dog, the notice shall specify the date upon which that determination is effective. (Code 1981, § 4-8-24, enacted by Ga. L. 1988, p. 824, § 2.)

4-8-25. Requirements for possessing dangerous or potentially dangerous dog.

(a) It is unlawful for an owner to have or possess within this state a dangerous dog or potentially dangerous dog without a certificate of registration issued in accordance with the provisions of this Code section.

(b) Subject to the additional requirements of subsection (c) of this Code section for dangerous dogs, the dog control officer of a local government in

which an owner possesses a dangerous dog or potentially dangerous dog shall issue a certificate of registration to the owner of such dog if the owner presents to the dog control officer or the dog control officer otherwise finds sufficient evidence of:

(1) A proper enclosure to confine the dangerous dog or potentially dangerous dog; and

(2) (A) The posting of the premises where the dangerous dog or potentially dangerous dog is located with a clearly visible sign warning that there is a dangerous dog on the property.

(B) The Department of Natural Resources shall design a uniform symbol for the purpose of implementing subparagraph (A) of this paragraph no later than July 1, 1989, and shall provide copies of the design to the governing authority of each county and municipality of this state. The sign required to be posted by subparagraph (A) of this paragraph shall conform substantially to the design provided by the Department of Natural Resources pursuant to this subparagraph.

(C) The requirement of subparagraph (A) of this paragraph shall become effective 60 days following the day the uniform design specified in subparagraph (B) of this paragraph is distributed to the governing authority of each county and municipality of the state.

(c) In addition to the requirements of subsection (b) of this Code section, the owner of a dangerous dog shall present to the dog control officer evidence of:

(1) A policy of insurance in the amount of at least \$15,000.00 issued by an insurer authorized to transact business in this state insuring the owner of the dangerous dog against liability for any personal injuries inflicted by the dangerous dog; or

(2) A surety bond in the amount of \$15,000.00 or more issued by a surety company authorized to transact business in this state payable to any person or persons injured by the dangerous dog.

(d) The owner of a dangerous dog or potentially dangerous dog shall notify the dog control officer within 24 hours if the dog is on the loose, is unconfined, has attacked a human, has died, or has been sold or donated. If the dog has been sold or donated, the owner shall also provide the dog control officer with the name, address, and telephone number of the new owner of the dog.

(e) The owner of a dangerous dog or potentially dangerous dog shall notify the dog control officer if the owner is moving from the dog control officer's jurisdiction. The owner of a dangerous dog or potentially dangerous dog who is a new resident of the State of Georgia shall register the dog as required in this Code section within 30 days after becoming a resident.

The owner of a dangerous dog or potentially dangerous dog who moves from one jurisdiction to another within the State of Georgia shall register the dangerous dog or potentially dangerous dog in the new jurisdiction within ten days after becoming a resident.

(f) Issuance of a certificate of registration or the renewal of a certificate of registration by a local government does not warrant or guarantee that the requirements specified in subsections (b) and (c) of this Code section are maintained by the owner of a dangerous dog or potentially dangerous dog on a continuous basis following the date of the issuance of the initial certificate of registration or following the date of any annual renewal of such certificate.

(g) A dog control officer is authorized to make whatever inquiry is deemed necessary to ensure compliance with the provisions of this article. Law enforcement agencies of local governments and the sheriffs of counties shall cooperate with dog control officers in enforcing the provisions of this article.

(h) A local government may charge an annual fee, in addition to regular dog-licensing fees, to register dangerous dogs and potentially dangerous dogs as required in this Code section. Certificates of registration shall be renewed on an annual basis. At the time of the annual renewal of a certificate of registration, a dog control officer shall require evidence from the owner or make such investigation as may be necessary to verify that the dangerous dog or potentially dangerous dog is continuing to be confined in a proper enclosure and that the owner is continuing to comply with other provisions of this article. (Code 1981, § 4-8-25, enacted by Ga. L. 1988, p. 824, § 2; Ga. L. 1989, p. 159, § 3; Ga. L. 1989, p. 1552, § 15.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1989, “subparagraph” was substituted for “Subparagraph” twice in subparagraphs (b)(2)(B) and (b)(2)(C) and a comma was added following

“July 1, 1989” in subparagraph (b)(2)(B) of this Code section.

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 143 (1989).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting. — The offenses established by this Code section and the 1989 amendment do not appear to fall within the statutory categories set forth by the General

Assembly requiring fingerprinting; therefore, they shall not be designated as offenses requiring fingerprinting. 1989 Op. Att’y Gen. 89-52.

4-8-26. Restrictions on permitting dangerous or potentially dangerous dogs to be outside proper enclosure.

(a) It is unlawful for an owner of a dangerous dog to permit the dog to be outside a proper enclosure unless the dog is muzzled and restrained by a substantial chain or leash and is under the physical restraint of a responsible person. The muzzle shall be made in a manner that will not

cause injury to the dog or interfere with its vision or respiration but will prevent it from biting any person.

(b) It is unlawful for the owner of a potentially dangerous dog to permit the dog to be outside a proper enclosure unless the dog is restrained by a substantial chain or leash and is under the restraint of a responsible person. (Code 1981, § 4-8-26, enacted by Ga. L. 1988, p. 824, § 2.)

4-8-27. Confiscation of dogs; grounds; disposition.

(a) A dangerous dog shall be immediately confiscated by the dog control officer or by a law enforcement officer or by another person authorized by the dog control officer if the:

(1) Owner of the dog does not secure the liability insurance or bond required by subsection (c) of Code Section 4-8-25;

(2) Dog is not validly registered as required by Code Section 4-8-25;

(3) Dog is not maintained in a proper enclosure; or

(4) Dog is outside a proper enclosure in violation of subsection (a) of Code Section 4-8-26.

(b) A potentially dangerous dog shall be confiscated in the same manner as a dangerous dog if the dog is:

(1) Not validly registered as required by Code Section 4-8-25;

(2) Not maintained in a proper enclosure; or

(3) Outside a proper enclosure in violation of subsection (b) of Code Section 4-8-26.

(c) Any dog that has been confiscated under the provisions of subsection (a) or (b) of this Code section shall be returned to its owner upon the owner's compliance with the provisions of this article and upon the payment of reasonable confiscation costs. In the event the owner has not complied with the provisions of this article within 20 days of the date the dog was confiscated, said dog shall be destroyed in an expeditious and humane manner. (Code 1981, § 4-8-27, enacted by Ga. L. 1988, p. 824, § 2.)

4-8-28. Violations; penalties.

(a) The owner of a dangerous dog who violates the applicable provisions of Code Section 4-8-25 or Code Section 4-8-26 or whose dangerous dog is subject to confiscation under subsection (a) of Code Section 4-8-27 shall be guilty of a misdemeanor of high and aggravated nature. In addition to any confinement that might be imposed for a conviction under this subsection, for the second conviction a fine of not less than \$500.00 shall be imposed

and for a third or subsequent conviction a fine of not less than \$750.00 shall be imposed.

(b) The owner of a potentially dangerous dog who violates the applicable provisions of Code Section 4-8-25 or Code Section 4-8-26 or whose potentially dangerous dog is subject to confiscation under subsection (b) of Code Section 4-8-27 shall be guilty of a misdemeanor. In addition to any confinement that might be imposed for a conviction under this subsection, for a second conviction a fine of not less than \$150.00 shall be imposed and for a third or subsequent conviction a fine of not less than \$300.00 shall be imposed.

(c) If an owner who has a previous conviction for a violation of this article knowingly and willfully fails to comply with the provisions of this article, such owner shall be guilty of a felony if the owner's dangerous dog attacks or bites a human being under circumstances constituting another violation of this article. The owner of a dangerous dog who is convicted for a violation of this subsection shall be punished by a fine of not less than \$1,000.00 nor more than \$5,000.00 or by imprisonment for not less than one nor more than five years or by both such fine and imprisonment.

(d) An owner who knowingly and willfully fails to comply with the provisions of this article shall be guilty of a felony if the owner's dangerous dog aggressively attacks and causes severe injury or death of a human being under circumstances constituting a violation of this article. The owner of a dangerous dog who is convicted for a violation of this subsection shall be punished by a fine of not less than \$5,000.00 nor more than \$10,000.00 or by imprisonment for not less than one nor more than ten years or by both such fine and imprisonment.

(e) In addition to the penalties for violations under subsection (c) or (d) of this Code section, the dangerous dog involved shall be immediately confiscated by the dog control officer or by a law enforcement officer or another person authorized by the dog control officer and placed in quarantine for the proper length of time as determined by the county board of health, and, thereafter, the dangerous dog shall be destroyed in an expeditious and humane manner.

(f) No owner of a dangerous dog shall be held criminally liable under this article for injuries inflicted by said owner's dog to any human being while on the owner's property. (Code 1981, § 4-8-28, enacted by Ga. L. 1988, p. 824, § 2.)

4-8-29. Supplementary nature of article; purposes.

(a) The provisions of this article are in addition to and supplementary of any previously existing laws of this state and shall not be construed to repeal or supersede such previously existing laws.

(b) It is the intention of this article to establish as state law minimum standards and requirements for the control of dangerous dogs and potentially dangerous dogs and to provide for certain state crimes for violations of such minimum standards and requirements. However, this article shall not supersede or invalidate existing ordinances or resolutions of local governments or prohibit local governments from adopting and enforcing ordinances or resolutions which provide for more restrictive control of dogs, including a more restrictive definition of a dangerous dog or potentially dangerous dog, than the minimum standards and requirements provided for in this article. (Code 1981, § 4-8-29, enacted by Ga. L. 1988, p. 824, § 2; Ga. L. 1989, p. 159, § 4.)

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 143 (1989).

4-8-30. Liability for damages.

It is the intent of the General Assembly that the owner of a dangerous dog or potentially dangerous dog shall be solely liable for any injury to or death of a person caused by such dog. Under no circumstances shall a local government or any employee or official of a local government which enforces or fails to enforce the provisions of this article be held liable for any damages to any person who suffers an injury inflicted by a dog that has been identified as being a dangerous dog or potentially dangerous dog or by a dog that has been reported to the proper authorities as being a dangerous dog or potentially dangerous dog or by a dog that a local government has failed to identify as a dangerous dog or potentially dangerous dog or by a dog which has been identified as being a dangerous dog or potentially dangerous dog but has not been kept or restrained in the manner described in subsection (b) of Code Section 4-8-25 or by a dangerous dog or potentially dangerous dog whose owner has not maintained insurance coverage or a surety bond as required in subsection (c) of Code Section 4-8-25. (Code 1981, § 4-8-30, enacted by Ga. L. 1989, p. 159, § 5.)

Law reviews. — For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 143 (1989).

RESEARCH REFERENCES

ALR. — Liability for injuries inflicted by dog on public officer or employee, 74 ALR4th 1120.

Landlord's liability to third person for

injury resulting from attack on leased premises by dangerous or vicious animal kept by tenant, 87 ALR4th 1004.

CHAPTER 9

BIOLOGICALS PERMITS

Sec.		Sec.	
4-9-1.	Short title.	4-9-6.	Employment of field agents, clerical help, and other personnel.
4-9-2.	Definitions.	4-9-7.	Prohibited acts.
4-9-3.	Permits — Application; issuance; exemptions; posting.	4-9-8.	Seizure, destruction, and withholding from sale of adulterated, misbranded, or contaminated biologicals.
4-9-4.	Permits — Transferability; effect of death of permittee.	4-9-9.	Injunctions.
4-9-5.	Promulgation of rules and regulations; revocation or suspension of permits, licenses, and certificates.		

Cross references. — Regulation of manufacture and sale of drugs generally, Ch. 3, T. 26.

Administrative rules and regulations. — Use of biologicals on poultry and other animals, Official Compilation of Rules and Regulations of State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-16-1.

4-9-1. Short title.

This chapter may be cited as the “Georgia Biologicals Permit Act of 1966.” (Ga. L. 1966, p. 334, § 1.)

4-9-2. Definitions.

As used in this chapter, the term:

- (1) “Adulterant” means a substance used as an addition to another substance for falsification or adulteration.
- (2) “Adulteration” means an addition of an impure, cheap, or unnecessary ingredient to cheat, cheapen, or falsify a preparation.
- (3) “Biologicals” means medicinal preparations made from living organisms and their products, including serums, vaccines, antigens, and antitoxins which are for use on poultry and animals, excluding humans.
- (4) “Contaminant” means something that causes contamination, such as a foreign organism developing accidentally in a pure culture.
- (5) “Contamination” means the soiling or making inferior by contact or mixing. (Ga. L. 1966, p. 334, § 3.)

4-9-3. Permits — Application; issuance; exemptions; posting.

(a) Every producer, manufacturer, distributor, or sales outlet selling, offering for sale, exposing for sale, distributing, or storing biologicals shall

register with and obtain a permit from the department prior to engaging in such activities. No person, firm, or partnership shall engage in any such activities without a permit or while its permit is suspended or revoked. The registration and application for a permit shall be made on a form prescribed by the Commissioner. Upon compliance with this chapter, the applicant shall be issued a permit by the Commissioner for all biological products manufactured, distributed, or sold by the applicant. A previous violation of the law or any regulation of the department by the applicant shall constitute just cause for refusal of a permit.

(b) This chapter shall not apply to any department of the federal or state government, any county board of health, any joint city-county board of health, any licensed graduate veterinarian whose primary use of biologicals is in his practice, or any retail establishment which purchases prepackaged biologicals not under its private label from a producer, manufacturer, distributor, or sales outlet registered under this chapter for sale to the general public only. Retail establishments which sell biologicals received from producers, manufacturers, and distributors, none of which are registered under this chapter, must obtain a separate permit for the biologicals obtained from each nonregistered source.

(c) Permits issued under this Code section shall be posted in a conspicuous place in the business.

(d) Any violation of this Code section shall constitute a misdemeanor. (Ga. L. 1965, p. 177, §§ 2-4; Ga. L. 1966, p. 334, §§ 4-6.)

OPINIONS OF THE ATTORNEY GENERAL

Limitation on authority of Commissioner to issue permits. — The authority of the Commissioner of Agriculture to issue permits for the manufacture and distribution of certain live viruses and disease vectors, and

of biologicals does not empower the commissioner to prohibit distribution of certain vaccines to certain individuals. 1975 Op. Att'y Gen. No. 75-23.

4-9-4. Permits — Transferability; effect of death of permittee.

Permits issued under this chapter shall not be transferable. Upon the death of a person to whom such a permit has been issued, the permit issued to such deceased person shall continue in full force and effect for a period of 90 days from the date of the death of such person, provided the Commissioner is notified of such death within 30 days from the date thereof. During the 90 day period, renewal shall not be required and the permit shall in all respects be subject to this chapter. The permit shall terminate upon the expiration of the 90 day period. (Ga. L. 1965, p. 177, § 11; Ga. L. 1966, p. 334, § 10.)

4-9-5. Promulgation of rules and regulations; revocation or suspension of permits, licenses, and certificates.

(a) The Commissioner shall promulgate such rules and regulations as he deems necessary to carry out the provisions and intention of this chapter.

(b) The Commissioner is authorized to revoke or suspend any permit issued under this chapter at any time when examination or inspection shall disclose violation of this chapter or any rule or regulation promulgated by the Commissioner, provided that unless revocation or termination is made automatic by this chapter, no license, permit, certificate, or other similar right shall be revoked or suspended without opportunity for hearing in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Ga. L. 1965, p. 177, § 7; Ga. L. 1966, p. 334, § 7.)

4-9-6. Employment of field agents, clerical help, and other personnel.

The Commissioner shall have the power and authority to employ field agents, clerical help, and other qualified personnel as may be necessary to carry out the purposes of and enforce this chapter. (Ga. L. 1965, p. 177, § 8; Ga. L. 1966, p. 334, § 8.)

4-9-7. Prohibited acts.

The following acts and the procurement, causing, aiding, or abetting of such acts within this state are prohibited:

(1) The manufacture, sale, delivery, holding or offering for sale, or storage of any biologicals that are adulterated, mislabeled, or contaminated;

(2) The receipt in commerce of biologicals known to be adulterated, mislabeled, or contaminated and the delivery or proffered delivery thereof with like knowledge, whether for pay or otherwise;

(3) The willful dissemination of false advertisements concerning any biologicals;

(4) The refusal to permit entry or inspection of any premises wherein biologicals are sold, held for sale, or stored and the refusal to permit the taking of a sample of any such biologicals;

(5) The giving of a guaranty or undertaking which is false except when such guaranty or undertaking is given by a person who relied on a guaranty or undertaking to the same effect signed by and containing the name and address of a manufacturer, producer, distributor, or sales outlet holding a permit from the department and from whom he received the biologicals in good faith;

(6) The removal or disposal of detained or embargoed biologicals, except by the Commissioner or his duly authorized agents;

(7) The adulteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of any biologicals or the doing of any other act with respect to biologicals, if such act is done while such biologicals are held for sale and results in such biologicals being misbranded; and

(8) The use on the labels of any biologicals or in any advertisement of any biologicals of any representation or suggestion that such biologicals have been approved by the department. (Ga. L. 1965, p. 177, § 12; Ga. L. 1966, p. 334, § 11.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 32. 25 Am. Jur. 2d, Drugs, Narcotics, and Poisons, §§ 28, 29, 32.

C.J.S. — 3A C.J.S., Animals, § 72. 28 C.J.S., Drugs, § 13 et seq.

ALR. — Validity, construction, and application of statutes or ordinances directed against false or fraudulent statements in advertisements, 89 ALR 1004.

4-9-8. Seizure, destruction, and withholding from sale of adulterated, misbranded, or contaminated biologicals.

The Commissioner shall have the right to seize, destroy, or withhold from sale any adulterated, misbranded, or contaminated biologicals. The Commissioner shall also have the right to withhold from sale any biological which he deems to be hazardous when administered by any persons other than an accredited licensed veterinarian, persons licensed under Chapter 50 of Title 43, or persons approved by him. (Ga. L. 1966, p. 334, § 13; Ga. L. 1976, p. 334, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Authorization to impound live rabies vaccine. — The Department of Agriculture is not authorized to impound live rabies vaccine in order to preclude the distribution of

the vaccine to individuals other than licensed veterinarians. 1975 Op. Att'y Gen. No. 75-23.

RESEARCH REFERENCES

ALR. — Lawfulness of seizure of property used in violation of law as prerequisite to

forfeiture action or proceeding, 8 ALR3d 473.

4-9-9. Injunctions.

The Commissioner or any person, corporation, firm, or association, in addition to the remedies set forth in this chapter, may obtain from a court of competent jurisdiction an injunction to restrain continued violations of

this chapter. The granting of an injunction is authorized, notwithstanding the fact that such violation also constitutes a misdemeanor and notwithstanding the availability of adequate remedies at law. (Ga. L. 1965, p. 177, § 10; Ga. L. 1966, p. 334, § 9.)

CHAPTER 10

DEALERS IN EXOTIC BIRDS AND PET BIRDS

Sec.		Sec.	
4-10-1.	Short title.		agriculture; list of birds; restrictions; permits; quarantine; violations.
4-10-2.	Legislative findings.		
4-10-3.	Definitions.		
4-10-4.	License — Requirement.	4-10-7.2.	Importing psittacine or exotic birds deemed potential carriers of disease; list of birds; restrictions; quarantine; violations.
4-10-5.	License — Issuance; duration; renewal; fees.	4-10-8.	Rules and regulations.
4-10-6.	Dealer's duty to maintain records; contents; periodic reports; failure to keep records as grounds for revocation of license; term of preservation.	4-10-9.	Enforcement procedure.
4-10-7.	Seizure, quarantine, and destruction of birds.	4-10-10.	Joint regulation by the Department of Agriculture and the Department of Human Resources.
4-10-7.1.	Importing birds detrimental to	4-10-11.	Construction of chapter.
		4-10-12.	Penalty.

4-10-1. Short title.

This chapter may be cited as the "Bird Dealers Licensing Act." (Ga. L. 1981, p. 510, § 1.)

4-10-2. Legislative findings.

The General Assembly finds that the sale of exotic and pet birds presents a serious potential hazard to the health of livestock and humans due to the potential of transmission of disease by birds. The General Assembly further finds that regulation of bird dealers is a necessary means of minimizing this hazard. (Ga. L. 1981, p. 510, § 2.)

4-10-3. Definitions.

As used in this chapter, the term:

(1) "Bird dealer" means any person engaged in the business of dealing in, purchasing, breeding, or offering for sale, whether at wholesale or retail, any exotic birds, pet birds, or birds customarily kept as pets.

(2) "Person" means any individual, firm, partnership, corporation, estate, trust, fiduciary, or other group or combination acting as a unit. (Ga. L. 1981, p. 510, § 3.)

4-10-4. License — Requirement.

It shall be unlawful for any person to act as a bird dealer unless such person has a valid bird dealer's license. (Ga. L. 1981, p. 510, § 4.)

4-10-5. License — Issuance; duration; renewal; fees.

(a) The department shall license bird dealers under the applicable provisions of Chapter 5 of Title 2, the “Department of Agriculture Registration, License, and Permit Act.”

(b) Bird dealers’ licenses shall be issued for a period of one year and shall be annually renewable. The department may establish separate classes of licenses, including wholesale and retail licenses. The department shall fix fees for licenses so that the revenue derived from licenses shall approximate the total direct and indirect costs of administering this chapter; but the annual fee for any such license shall be at least \$25.00 but shall not exceed \$200.00. (Ga. L. 1981, p. 510, § 4; Ga. L. 1992, p. 993, § 1.)

4-10-6. Dealer’s duty to maintain records; contents; periodic reports; failure to keep records as grounds for revocation of license; term of preservation.

(a) Every bird dealer shall keep records sufficient to identify:

(1) Each exotic or pet bird in his possession or sold by him, by species and physical description;

(2) The name, address, and telephone number of the person from whom each such bird was acquired and, if that person is a licensed bird dealer, then his license number or, if that person is not a licensed dealer, then his driver’s license number, social security number, federal tax identification number, or such other identification as may be available;

(3) The name, address, and telephone number of the person to whom each such bird is transferred and, if that person is a licensed bird dealer, then his license number or, if that person is not a licensed bird dealer, then his driver’s license number, social security number, or such other identification as may be available; and

(4) Any such bird which the dealer knows to be or have been sick or diseased or to have died.

(b) The department may require periodic reports of any or all of the records required by subsection (a) of this Code section. The department may require the keeping of additional records; and all required records shall be made available for inspection by the department.

(c) Failure to keep or make available any required records shall be grounds for revocation of a license.

(d) Every bird dealer shall keep all of such records for at least one year. (Ga. L. 1981, p. 510, § 5.)

4-10-7. Seizure, quarantine, and destruction of birds.

The department may quarantine, seize, and destroy any birds which present a hazard of carrying exotic or untreatable disease, as determined by rules and regulations promulgated by the Commissioner. The department shall pay an indemnity to the owner of any seized or destroyed birds from any federal funds made available for that purpose or any state funds appropriated for that purpose. (Ga. L. 1981, p. 510, § 6.)

Cross references. — Authority of Department of Human Resources to regulate importation, sale, etc., of animals and birds to be kept as pets, § 31-12-9.

4-10-7.1. Importing birds detrimental to agriculture; list of birds; restrictions; permits; quarantine; violations.

(a) The Commissioner of Agriculture shall by rule determine and establish a listing of all types of birds not native to this state which if introduced into this state would be capable of breeding in the wild and would, if established in the wild, present a threat of being detrimental to the agricultural industry of this state.

(b) Except as provided in subsection (c) of this Code section, it shall be unlawful to bring into this state any bird identified in the listing of birds established pursuant to subsection (a) of this Code section.

(c) The department may issue a permit to bring into this state a bird identified in the listing of birds established pursuant to subsection (a) of this Code section if the person applying for such a permit establishes to the satisfaction of the department that adequate precautions will be taken to ensure that neither the bird for which the permit is issued nor any offspring of such bird will be allowed to escape captivity.

(d) The department may quarantine, seize, and destroy any bird brought into this state in violation of this Code section.

(e) Any person convicted of violating the provisions of subsection (b) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 4-10-7.1, enacted by Ga. L. 1984, p. 1216, § 1.)

4-10-7.2. Importing psittacine or exotic birds deemed potential carriers of disease; list of birds; restrictions; quarantine; violations.

(a) As used in this Code section, the term “psittacine birds” includes birds commonly known as parrots, Amazons, African grays, cockatoos, macaws, parrotlets, beebees, parakeets, lovebirds, lories, lorikeets, and all other birds of the order Psittaciformes.

(b) It shall be unlawful to bring into this state any psittacine bird or other exotic bird designated by rule by the Commissioner of Agriculture as a

potential carrier of disease coming directly or indirectly from outside the United States unless the bird was brought into the United States in conformity with the quarantine regulations of the United States Department of Agriculture.

(c) The department may quarantine, seize, and destroy any bird brought into this state in violation of this Code section and any bird exposed to a bird brought into the state in violation of this Code section.

(d) Any person convicted of violating the provisions of subsection (b) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 4-10-7.2, enacted by Ga. L. 1984, p. 1216, § 1; Ga. L. 1985, p. 149, § 4.)

4-10-8. Rules and regulations.

The Commissioner may make any rules and regulations, not inconsistent with this chapter, governing dealing in or transportation of exotic or pet birds. (Ga. L. 1981, p. 510, § 8.)

4-10-9. Enforcement procedure.

(a) Notwithstanding any other provision of law, whenever it may appear to the Commissioner or his agent, either upon investigation or otherwise, that any person has engaged in, or is engaging in, or is about to engage in any act, practice, or transaction which is prohibited by any law or regulation governing activities for which a license is required by this chapter, whether or not the person has so registered or obtained such a license or permit, the Commissioner may issue an order, if he deems it to be in the public interest or necessary for the protection of the citizens of this state, prohibiting such person from continuing such act, practice, or transaction or suspending or revoking any such registration, license, or permit held by such person.

(b) In situations where persons would otherwise be entitled to a hearing prior to an order entered pursuant to subsection (a) of this Code section, the Commissioner may issue such an order to be effective upon a later date without a hearing unless a person subject to the order requests a hearing within ten days after receipt of the order. Failure to make the request shall constitute a waiver of any provision of law for a hearing. The order shall contain or shall be accompanied by a notice of opportunity for hearing, stating that a hearing must be requested within ten days of receipt of the notice and order. The order and notice shall be served in person by the Commissioner or his agent or by certified mail, return receipt requested. In the case of an individual registered with or issued a license or permit by the department, receipt of the order and notice will be conclusively presumed five days after the mailing of the order by certified mail, return receipt requested, to the address provided by such person in his most recent registration or license or permit application.

(c) In situations where persons would otherwise be entitled to a hearing prior to an order, the Commissioner may issue an order to be effective immediately if the Commissioner or his agent has reasonable cause to believe that an act, practice, or transaction is occurring or is about to occur, that the situation constitutes a situation of imminent peril to the public safety or welfare, and that the situation therefore requires emergency action. The emergency order shall contain findings to this effect and reasons for the determination. The order shall contain or be accompanied by a notice of opportunity for hearing, which notice may provide that a hearing will be held if and only if a person subject to the order requests a hearing within ten days of the receipt of the order and notice. The order and notice shall be served by the Commissioner or his agent or by certified mail, return receipt requested. In the case of an individual registered with or issued a license or permit by the department, receipt of the order and notice will be conclusively presumed five days after the mailing of the order by certified mail, return receipt requested, to the address provided by such person in his most recent registration or license or permit application.

(d) Any request for hearing made pursuant to subsections (b) and (c) of this Code section shall specify (1) in what respects such person is aggrieved, (2) any and all defenses such person intends to assert at the hearing, (3) affirmation or denial of all the facts and findings alleged in the order, and (4) an address to which any further correspondence or notices in the proceeding may be mailed. Upon such a request for hearing, the Commissioner shall schedule and hold the hearing, unless postponed by mutual consent, within 30 days after receipt by the Commissioner of the request therefor. The Commissioner shall give the person requesting the hearing notice of the time and place of the hearing by certified mail to the address specified in the request for hearing at least 15 days prior to the time of the hearing.

(e) Except where in conflict with the express provisions of this Code section and the reasonable implication of such provisions, the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," relating to contested cases shall be applicable to the actions of the Commissioner taken pursuant to this Code section and to the conduct and judicial review of any hearings held as a result thereof.

(f) The Commissioner may institute actions or other legal proceedings in any superior court of proper venue as may be required for the enforcement of any law or regulation governing activities for which registration with or a license or permit from the department is required.

(g) The Commissioner may prosecute an action in any superior court of proper venue to enforce any order made by him pursuant to this Code section.

(h) In cases in which the Commissioner institutes an action or other legal proceeding or prosecutes an action to enforce his order, the superior

court may, among other appropriate relief, issue a temporary restraining order or a preliminary, interlocutory, or permanent injunction restraining or enjoining persons from engaging in, or acting in concert with anyone engaging in, any acts, practices, or transactions prohibited by orders of the Commissioner or any law or regulation governing activities for which registration with or a license or permit from the department is required. (Ga. L. 1981, p. 510, § 10; Ga. L. 1984, p. 22, § 4.)

Cross references. — Authority of Commissioner to impose penalty in lieu of other action, § 2-2-10.

4-10-10. Joint regulation by the Department of Agriculture and the Department of Human Resources.

If the Department of Human Resources elects to regulate the sale or transportation of exotic or pet birds under the authority of Code Section 31-12-9, then the Department of Human Resources shall cooperate with the Department of Agriculture in developing and implementing such regulation. (Ga. L. 1981, p. 510, § 7.)

4-10-11. Construction of chapter.

Nothing in this chapter shall be construed to repeal or preempt any laws or parts of laws administered by the Department of Natural Resources. However, insofar as any authority created by this chapter duplicates any other current or future authorities of the Department of Natural Resources with respect to Class Aves, the Department of Agriculture and the Department of Natural Resources shall cooperate in the administration of those duplicated authorities. (Ga. L. 1981, p. 510, § 11; Ga. L. 1986, p. 10, § 4.)

4-10-12. Penalty.

Any person who acts as a bird dealer without a license in violation of this chapter shall be guilty of a misdemeanor. (Ga. L. 1981, p. 510, § 4.)

ANIMALS

CHAPTER 11

ANIMAL PROTECTION

Article 1		Sec.	
General Provisions			
Sec.			
4-11-1.	Short title.	4-11-9.1.	Quarantine of animal, premises, or any area by Commissioner.
4-11-2.	Definitions.	4-11-10.	Unlawful acts by licensed persons.
4-11-3.	Licenses for pet dealers and kennel, stable, or animal shelter operators; requirement; issuance; application.	4-11-11.	Shipment of animals into state without certificates of health.
4-11-4.	Display of licenses.	4-11-12.	Cooperation with federal government.
4-11-5.	Licensing of bird dealers.	4-11-13.	Animals raised, kept, or maintained for human consumption.
4-11-5.1.	Euthanasia of dogs and cats by animal shelters or facilities operated for collection of stray, neglected, abandoned, or unwanted animals.	4-11-14.	Rules and regulations.
		4-11-15.	Injunctions and restraining orders.
		4-11-16.	Violations of article, rules, and regulations a misdemeanor.
		Article 2	
		Farm Animal and Research Facilities Protection	
4-11-6.	Applicability of article to nonresidents; consent to jurisdiction; service.	4-11-30.	Short title.
4-11-7.	Grounds for refusal to issue or renew or suspension or revocation of licenses.	4-11-31.	Definitions.
4-11-8.	Denial, suspension, or revocation of license for violation of article; applicability of "Georgia Administrative Procedure Act."	4-11-32.	Prohibited acts; applicability.
4-11-9.	Inspections.	4-11-33.	Penalty for violation.
		4-11-34.	Powers and duties of Commissioner.
		4-11-35.	Attorneys' fees; injunctions; other rights arising out of or relating to violation of article.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting offenders. — Violation of any of the provisions of this chapter (now Article 1 of this chapter) are offenses for which those charged with a violation are to be fingerprinted. 1986 Op. Att'y Gen. 86-30.

ARTICLE 1

GENERAL PROVISIONS

Editor's notes. — Ga. L. 1990, p. 328, § 1, effective July 1, 1990, designated the existing provisions of this chapter as Article 1 and enacted Article 2 thereof.

4-11-1. Short title.

This article shall be known and may be cited as the "Georgia Animal Protection Act." (Code 1981, § 4-11-1, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 1993, p. 91, § 4.)

The 1993 amendment, effective March 22, 1993, inserted "shall be known and".

4-11-2. Definitions.

As used in this article, the term:

(1) "Adequate food and water" means food and water which is sufficient in amount and appropriate for the particular type of animal to prevent starvation, dehydration, or a significant risk to the animal's health from a lack of food or water.

(2) "Animal shelter" means any facility operated by or under contract for the state, a county, a municipal corporation, or any other political subdivision of the state for the purpose of impounding or harboring seized, stray, homeless, abandoned, or unwanted dogs, cats, and other animals; any veterinary hospital or clinic operated by a veterinarian or veterinarians which operates for such purpose in addition to its customary purposes; and any facility operated, owned, or maintained by a duly incorporated humane society, animal welfare society, or other nonprofit organization for the purpose of providing for and promoting the welfare, protection, and humane treatment of animals.

(3) "Equine" means any member of the Equidae species, including horses, mules, and asses.

(4) "Humane care" of animals means, but is not limited to, the provision of adequate heat, ventilation, sanitary shelter, and wholesome and adequate food and water, consistent with the normal requirements and feeding habits of the animal's size, species, and breed.

(5) "Kennel" means any establishment, other than an animal shelter, where dogs or cats are maintained for boarding, holding, training, or similar purposes for a fee or compensation.

(6) "Person" means any person, firm, corporation, partnership, association, or other legal entity, any public or private institution, the State of Georgia, or any county, municipal corporation, or political subdivision of the state.

(7) "Pet dealer" or "pet dealership" means any person who sells, offers to sell, exchanges, or offers for adoption dogs, cats, birds, fish, reptiles, or other animals customarily obtained as pets in this state. However, a person who sells only animals that he has produced and

raised, not to exceed 30 animals a year, shall not be considered a pet dealer under this article unless such a person is licensed for a business by a local government or has a Georgia sales tax number. The Commissioner may with respect to any breed of animals decrease the 30 animal per year exception in the foregoing sentence to a lesser number of any animals for any species which is commonly bred and sold for commercial purposes in lesser quantities. Operation of a veterinary hospital or clinic by a licensed veterinarian shall not constitute the veterinarian a pet dealer, kennel, or stable under this article.

(8) "Secretary of Agriculture" means the Secretary of the United States Department of Agriculture.

(9) "Stable" means any building, structure, pasture, or other enclosure where equines are maintained for boarding, holding, training, breeding, riding, pulling vehicles, or other similar purposes and a fee is charged for maintaining such equines or for the use of such equines. (Code 1981, § 4-11-2, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 1990, p. 1650, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1990, "equines" was substituted for "equine" in paragraph (9).

4-11-3. Licenses for pet dealers and kennel, stable, or animal shelter operators; requirement; issuance; application.

(a) It shall be unlawful for any person to act as a pet dealer or operate a kennel, stable, or animal shelter unless such person has a valid license issued by the Commissioner of Agriculture. Any person acting without a license in violation of this subsection shall be guilty of a misdemeanor.

(b) The Commissioner shall license pet dealers and kennel, stable, and animal shelter operators under the applicable provisions of Chapter 5 of Title 2, the "Department of Agriculture Registration, License, and Permit Act."

(c) Licenses shall be issued for a period of one year and shall be annually renewable. The Commissioner may establish separate classes of licenses, including wholesale and retail licenses. The Commissioner shall fix fees for licenses so that the revenue derived from licenses shall approximate the total direct cost of administering this article. The Commissioner may establish different fees for the different classes of licenses established, but the annual fee for any such license shall be at least \$25.00 but shall not exceed \$200.00.

(d) Applications for licenses shall be on a form furnished by the Commissioner and, together with such other information as the Commissioner shall require, shall state:

- (1) The name of the applicant;
- (2) The business address of the applicant;
- (3) The complete telephone number of the applicant;
- (4) The location of the pet dealership, kennel, stable, or animal shelter;
- (5) The type of ownership of the pet dealership, kennel, stable, or animal shelter; and
- (6) The name of the owner or, if a partnership, firm, corporation, or other entity, the name of the partners or stockholders.

(e) Notwithstanding the provisions of subsection (c) of this Code section, the license fees fixed pursuant to subsection (c) of this Code section shall be increased by 100 percent for the renewal of any license which is not renewed within ten days following the expiration date of the license or for the issuance of a new license to any person who has failed to apply for a license within ten days following the date on which written notice of the need for such license has been given to such person by the Commissioner or his authorized representative. (Code 1981, § 4-11-3, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 1990, p. 1650, § 2; Ga. L. 1992, p. 1122, § 1.)

4-11-4. Display of licenses.

A license must be prominently displayed at each place of business of a pet dealer and at each kennel, stable, and animal shelter in this state. (Code 1981, § 4-11-4, enacted by Ga. L. 1986, p. 628, § 1.)

4-11-5. Licensing of bird dealers.

Any person licensed by the department as a bird dealer shall not be required to obtain a license under this article if such person does not deal in animals other than birds. If, however, a licensed bird dealer sells, offers to sell, exchanges, or offers for adoption dogs, cats, fish, reptiles, or other animals (other than birds) customarily obtained as pets, then such dealer shall be required to obtain a license under this article in addition to his bird dealer's license. (Code 1981, § 4-11-5, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-5.1. Euthanasia of dogs and cats by animal shelters or facilities operated for collection of stray, neglected, abandoned, or unwanted animals.

(a) Except as provided in subsection (b) of this Code section, the use of sodium pentobarbital or a derivative of it shall be the exclusive method for

euthanasia of dogs and cats by animal shelters or other facilities which are operated for the collection and care of stray, neglected, abandoned, or unwanted animals. A lethal solution shall be used in the following order of preference:

- (1) Intravenous injection by hypodermic needle;
- (2) Intraperitoneal injection by hypodermic needle; or
- (3) Intracardial injection by hypodermic needle.

(b) Notwithstanding subsection (a) of this Code section:

(1) A chamber using commercially bottled carbon monoxide gas which was used on July 1, 1990, for euthanasia of dogs and cats by any animal shelter or other facility may continue to be used for such purposes by such animal shelter or facility if such animal shelter or facility notifies the Commissioner of Agriculture, in writing, on or before August 1, 1990, that such a chamber was in use by such animal shelter or facility on July 1, 1990. However, a chamber which causes a change in body oxygen by means of altering atmospheric pressure or which is connected to an internal combustion engine and uses the engine exhaust for euthanasia purposes shall not be permitted under any circumstances; and

(2) Any substance which is clinically proven to be as humane as sodium pentobarbital and which has been officially recognized as such by the American Veterinary Medical Association may be used in lieu of sodium pentobarbital to perform euthanasia on dogs and cats, but succinylcholine chloride, curare, curariform mixtures, or any substance which acts as a neuromuscular blocking agent may not be used on a dog or cat in lieu of sodium pentobarbital for euthanasia purposes.

(c) In addition to the exceptions provided for in subsection (b) of this Code section, in cases of extraordinary circumstance where the dog or cat poses an extreme risk or danger to the veterinarian, physician, or lay person performing euthanasia, such person shall be allowed the use of any other substance or procedure that is humane to perform euthanasia on such dangerous dog or cat.

(d) A dog or cat may be tranquilized with an approved and humane substance before euthanasia is performed.

(e) Euthanasia shall be performed by a licensed veterinarian or physician or a lay person who is properly trained in the proper and humane use of a method of euthanasia. Such lay person shall perform euthanasia under supervision of a licensed veterinarian or physician. This shall not be construed so as to require that a veterinarian or physician be present at the time euthanasia is performed.

(f) No dog or cat may be left unattended between the time euthanasia procedures are first begun and the time death occurs, nor may its body be disposed of until death is confirmed by a qualified person.

(g) The supervising veterinarian or physician shall be subject to all record-keeping requirements and inspection requirements of the State Board of Pharmacy pertaining to sodium pentobarbital and other drugs authorized under subsection (b) of this Code section and may limit the quantity of possession of sodium pentobarbital and other drugs authorized to ensure compliance with the provisions of this Code section.

(h) This Code section shall not apply to any animal shelter or other facility located in a county having a population of 25,000 or less according to the most recent United States decennial census. (Code 1981, § 4-11-5.1, enacted by Ga. L. 1990, p. 1686, § 1.)

Code Commission notes. — Pursuant to “euthanasia” was corrected the first time it Code Section 28-9-5, in 1990, the spelling of appears in subsection (c).

4-11-6. Applicability of article to nonresidents; consent to jurisdiction; service.

Any person who is not a resident of this state but who engages in this state in any activities for which a license is required by this article shall be subject to this article as to such activities. Each nonresident applicant for a license required by this article shall be required as a condition of licensure to execute a consent to the jurisdiction of the courts of this state for any action filed under this article; and service of process in any such action shall be by certified mail by the Commissioner. (Code 1981, § 4-11-6, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-7. Grounds for refusal to issue or renew or suspension or revocation of licenses.

The Commissioner may refuse to issue or renew or may suspend or revoke a license on any one or more of the following grounds:

- (1) Material misstatement in the application for the original license or in the application for any renewal license under this article;
- (2) Willful disregard or violation of this article or of any rules or regulations issued pursuant to this article;
- (3) Willfully aiding or abetting another in the violation of this article or of any regulation or rule issued pursuant to this article;
- (4) Allowing a license issued under this article to be used by an unlicensed person;
- (5) A violation of any law of this state or rule of the Commissioner related to the disposition of, dealing in, or handling of dogs, cats, equines, and other animals;
- (6) Making substantial misrepresentations or false promises in connection with the business of a licensee under this article;

(7) Pursuing a continued course of making misrepresentations or false promises through advertising, salesmen, agents, or otherwise in connection with the business of a licensee under this article;

(8) Failure to possess the necessary qualifications or meet the requirements of this article for the issuance or holding of a license; or

(9) Failure to provide proper facilities. (Code 1981, § 4-11-7, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-8. Denial, suspension, or revocation of license for violation of article; applicability of "Georgia Administrative Procedure Act."

The Commissioner is authorized to deny, suspend, or revoke any license required by this article, subject to notice and a hearing, in any case in which he finds that there has been a violation of this article or any rule or regulation adopted pursuant to this article. All proceedings for denial, suspension, or revocation of a license shall be conducted in conformance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1981, § 4-11-8, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-9. Inspections.

The Commissioner or his designated agents are authorized to enter upon any public or private property at any time for the purpose of inspecting the business premises of any pet dealer or any animal shelter, kennel, or stable and the dogs, cats, equines, or other animals housed at such facility to determine if such facility is licensed and for the purpose of enforcing this article and the rules and regulations adopted by the Commissioner pursuant to this article. (Code 1981, § 4-11-9, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-9.1. Quarantine of animal, premises, or any area by Commissioner.

(a) In the control, suppression, prevention, and eradication of animal diseases, the Commissioner or any duly authorized representative acting under his authority is authorized and required to quarantine an animal, premises, or any area when he shall determine that animals in such place or places are infected with a contagious or infectious disease, that the unsanitary condition of such place or places might cause the spread of such disease, that the animal has or has been exposed to any contagious or infectious disease, or that the owner or occupant of such place or places is not observing sanitary practices prescribed under the authority of this article or any other law of this state.

(b) The Commissioner or his duly authorized representative is authorized to issue and enforce written or printed stop sale, stop use, or stop

movement orders to the owners or custodians of any animals, ordering them to hold such animals at a designated place, when the Commissioner or his duly authorized representative finds such animals:

(1) To be infected with or to have been exposed to any contagious or infectious disease;

(2) To be held by a person who is required to be licensed under this article and whose license has expired;

(3) To be held by a person who is required to be licensed under this article and who has failed to obtain a license within ten days of the date on which written notice of need to obtain a license was given to such person by the Commissioner or his authorized representative; or

(4) To have been held in violation of this article,

until the law has been complied with and such animals have been released, in writing, by the Commissioner or the violations have been otherwise legally disposed of by written authority.

(c) It shall be unlawful for any person to sell, use, or move any animal in violation of any quarantine or stop sale, stop use, or stop removal order issued under this Code section. (Code 1981, § 4-11-9.1, enacted by Ga. L. 1990, p. 1650, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1990, “article” was substituted for “chapter” in subsection (a) and paragraphs (2), (3), and (4) of subsection (b), since Ga. L. 1990, p. 328 so amended other Code sections in this article.

4-11-10. Unlawful acts by licensed persons.

It shall be unlawful for any person licensed under this article or any person employed by a person licensed under this article or under his supervision or control to:

(1) Commit a violation of Code Section 16-12-4, relating to cruelty to animals, when such violation occurs on the premises of or is related to the operation of the pet dealership, animal shelter, kennel, or stable for which the license has been issued or any other such facility operated by the same person;

(2) Fail to keep the pet dealership premises, animal shelter, kennel, or stable in a good state of repair, in a clean and sanitary condition, adequately ventilated, or disinfected when needed;

(3) Fail to provide adequate food and water;

(4) Fail to provide adequate and humane care for any dog, cat, equine, or other animal at such facility; or

(5) Fail to take reasonable care to release for sale, trade, or adoption only those animals which appear to be free of disease, injuries, or

abnormalities. (Code 1981, § 4-11-10, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-11. Shipment of animals into state without certificates of health.

It shall be unlawful for any person to ship any animal, other than equines, livestock, birds, cold-blooded animals, and rodents, into this state for the purpose of resale unless such animal is accompanied by a U.S. interstate or international certificate of health. (Code 1981, § 4-11-11, enacted by Ga. L. 1986, p. 628, § 1.)

4-11-12. Cooperation with federal government.

The Commissioner may cooperate with the United States Secretary of Agriculture in carrying out Public Law 89-544, commonly known as the Animal Welfare Act, as amended by Public Laws 91-579 and 94-279, and the rules and regulations issued by the Secretary of Agriculture under that act. The Commissioner may promulgate regulations to facilitate cooperation and avoid any unnecessary duplication or conflict of activities by the department and the Secretary of Agriculture in regulating the activities or areas covered by this article and Public Law 89-544. The regulations may be in addition to other regulations authorized by this article. (Code 1981, § 4-11-12, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

U.S. Code. — The Animal Welfare Act, referred to in this Code section, is codified as 7 U.S.C. §§ 2131-2155.

4-11-13. Animals raised, kept, or maintained for human consumption.

The provisions of this article shall not apply to any person who raises, keeps, or maintains animals solely for the purposes of human consumption. (Code 1981, § 4-11-13, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-14. Rules and regulations.

The Commissioner is authorized to promulgate and adopt rules and regulations necessary or appropriate to carry out this article. (Code 1981, § 4-11-14, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-15. Injunctions and restraining orders.

In addition to the remedies provided in this article or elsewhere in the laws of this state and notwithstanding the existence of an adequate remedy at law, the Commissioner is authorized to apply to the superior courts for an injunction or restraining order. Such courts shall have jurisdiction and for

good cause shown shall grant a temporary or permanent injunction or an ex parte or restraining order, restraining or enjoining any person, partnership, firm, corporation, or other entity from violating and continuing to violate this article or any rules and regulations promulgated under this article. Such injunction or restraining order shall be issued without bond and may be granted notwithstanding the fact that the violation constitutes a criminal act and notwithstanding the pendency of any criminal prosecution for the same violation. (Code 1981, § 4-11-15, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-16. Violations of article, rules, and regulations a misdemeanor.

Any person, partnership, firm, corporation, or other entity violating any of the provisions of this article or any rule or regulation of the Commissioner adopted pursuant to this article shall be guilty of a misdemeanor. (Code 1981, § 4-11-16, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

ARTICLE 2

FARM ANIMAL AND RESEARCH FACILITIES PROTECTION

4-11-30. Short title.

This article shall be known and may be cited as the “Georgia Farm Animal and Research Facilities Protection Act.” (Code 1981, § 4-11-30, enacted by Ga. L. 1990, p. 328, § 1.)

Law reviews. — For note on 1990 enactment of this article, see 7 Ga. St. U.L. Rev. 197 (1990).

4-11-31. Definitions.

As used in this article, the term:

(1) “Actor” means a person accused of any of the offenses defined in Code Section 4-11-32.

(2) “Animal” means any warm or cold-blooded animal or insect which is being used in food or fiber production, agriculture, research, testing, or education, including, but not limited to, hogs, equines, mules, cattle, sheep, ratites, goats, dogs, rabbits, poultry, fish, and bees. The term “animal” shall not include any animal held primarily as a pet.

(3) “Animal facility” includes any vehicle, building, structure, pasture, paddock, pond, impoundment, or premises where an animal is kept, handled, housed, exhibited, bred, or offered for sale and any office,

building, or structure where records or documents relating to an animal or to animal research, testing, production, or education are maintained.

(4) "Commissioner" means the Commissioner of Agriculture.

(5) "Consent" means assent in fact, whether express or implied, by the owner or by a person legally authorized to act for the owner which is not:

(A) Induced by force, threat, false pretenses, or fraud;

(B) Given by a person the actor knows, or should have known, is not legally authorized to act for the owner;

(C) Given by a person who by reason of youth, mental disease or defect, or intoxication is known, or should have been known, by the actor to be unable to make reasonable decisions; or

(D) Given solely to detect the commission of an offense.

(6) "Deprive" means unlawfully to withhold from the owner, interfere with the possession of, free, or dispose of an animal or other property.

(7) "Owner" means a person who has title to the property, lawful possession of the property, or a greater right to possession of the property than the actor.

(8) "Person" means any individual, corporation, association, non-profit corporation, joint-stock company, firm, trust, partnership, two or more persons having a joint or common interest, or other legal entity.

(9) "Possession" means actual care, custody, control, or management.

(10) "Property" means any real or personal property and shall include any document, record, research data, paper, or computer storage medium.

(11) "State" means the State of Georgia. (Code 1981, § 4-11-31, enacted by Ga. L. 1990, p. 328, § 1; Ga. L. 1995, p. 244, § 9.)

The 1995 amendment, effective April 7, 1995, inserted "ratites," in the first sentence in paragraph (2).

4-11-32. Prohibited acts; applicability.

(a) A person commits an offense if, without the consent of the owner, the person acquires or otherwise exercises control over an animal facility, an animal from an animal facility, or other property from an animal facility with the intent to deprive the owner of such facility, animal, or property and to disrupt or damage the enterprise conducted at the animal facility.

(b) A person commits an offense if, without the consent of the owner, the person damages or destroys an animal facility or damages, frees, or

destroys any animal or property in or on an animal facility with the intent to disrupt or damage the enterprise conducted at the animal facility and the damage or loss thereto exceeds \$500.00.

(c) (1) A person commits an offense if, without the consent of the owner, the person damages or destroys an animal facility or damages, frees, or destroys any animal or property in or on an animal facility and the damage or loss thereto is \$500.00 or less or enters or remains on an animal facility with the intent to disrupt or damage the enterprise conducted at the animal facility, and the person:

(A) Had notice that the entry was forbidden;

(B) Knew or should have known that the animal facility was or had closed to the public; or

(C) Received notice to depart but failed to do so.

(2) For purposes of this subsection “notice” means:

(A) Oral or written communication by the owner or someone with actual or apparent authority to act for the owner;

(B) The presence of fencing or other type of enclosure or barrier designed to exclude intruders or to contain animals; or

(C) A sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

(d) This Code section shall not apply to, affect, or otherwise prohibit actions taken by the Department of Agriculture, any other federal, state, or local department or agency, or any official, employee, or agent thereof while in the exercise or performance of any power or duty imposed by law or by rule and regulation. (Code 1981, § 4-11-32, enacted by Ga. L. 1990, p. 328, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of violators. — Violation of the provisions of subsection (c) is designated as an offense for which those charged with a violation are to be fingerprinted in order to promote consistency in the treatment of offenders. 1990 Op. Att’y Gen. No. 90-22.

4-11-33. Penalty for violation.

(a) A person convicted of any of the offenses defined in subsections (a) and (b) of Code Section 4-11-32 shall be guilty of a felony and, upon conviction, shall be punished by a fine not to exceed \$10,000.00 or by imprisonment for a term not to exceed three years, or both.

(b) Any person violating subsection (c) of Code Section 4-11-32 shall be guilty of a misdemeanor. (Code 1981, § 4-11-33, enacted by Ga. L. 1990, p. 328, § 1.)

4-11-34. Powers and duties of Commissioner.

For purposes of enforcing the provisions of this article, the Commissioner:

- (1) May investigate any offense under this article;
- (2) May seek the assistance of any law enforcement agency of the United States, the state, or any local government in the conduct of such investigations; and
- (3) Shall coordinate such investigation, to the maximum extent practicable, with the investigations of any law enforcement agency of the United States, the state, or any local government. (Code 1981, § 4-11-34, enacted by Ga. L. 1990, p. 328, § 1.)

4-11-35. Attorneys' fees; injunctions; other rights arising out of or relating to violation of article.

(a) Any person who has been damaged by reason of a violation of this article may recover all actual and consequential damages, punitive damages, and court costs, including reasonable attorneys' fees, from the person causing such damage.

(b) In addition to the remedies provided in this article or elsewhere in the laws of this state and notwithstanding the existence of an adequate remedy at law, any person who has been damaged by reason of a violation of this article is authorized to apply to the superior courts for an injunction or restraining order. Such courts shall have jurisdiction and for good cause shown shall grant a temporary or permanent injunction or a temporary restraining order restraining or enjoining any person from violating or continuing to violate this article. Such injunction or restraining order shall be issued without bond and may be granted notwithstanding the fact that the violation constitutes a criminal act and notwithstanding the pendency of any criminal prosecution for the same violation.

(c) Nothing in this article shall be construed to limit the exercise of any other rights arising out of or relating to a violation of this article. (Code 1981, § 4-11-35, enacted by Ga. L. 1990, p. 328, § 1.)

CHAPTER 12

INJURIES FROM EQUINE ACTIVITIES

Sec.		Sec.	
4-12-1.	Legislative findings.		ure to comply with notice re-
4-12-2.	Definitions.		quirement.
4-12-3.	Immunity from liability for in-	4-12-5.	Warning signs or notices posted
	jury or death; exceptions.		by llama activity sponsors or
4-12-4.	Warning required; effect of fail-		llama professionals.

4-12-1. Legislative findings.

The General Assembly recognizes that persons who participate in equine activities or llama activities may incur injuries as a result of the risks involved in such activities. The General Assembly also finds that the state and its citizens derive numerous economic and personal benefits from such activities. The General Assembly finds, determines, and declares that this chapter is necessary for the immediate preservation of the public peace, health, and safety. It is, therefore, the intent of the General Assembly to encourage equine activities and llama activities by limiting the civil liability of those involved in such activities. (Code 1981, § 4-12-1, enacted by Ga. L. 1991, p. 680, § 1; Ga. L. 1995, p. 335, § 1.)

The 1995 amendment, effective July 1, 1995, inserted “or llama activities” in the first sentence and “and llama activities” in the last sentence.

4-12-2. Definitions.

As used in this chapter, the term:

- (1) “Engages in a llama activity” means riding, training, assisting in providing medical treatment of, driving, or being a passenger upon a llama, whether mounted or unmounted, or any person assisting a participant or show management. The term “engages in a llama activity” does not include being a spectator at a llama activity, except in cases where the spectator places himself or herself in an unauthorized area and in immediate proximity to the llama activity.
- (2) “Engages in an equine activity” means riding, training, assisting in providing medical treatment of, driving, or being a passenger upon an equine, whether mounted or unmounted, or any person assisting a participant or show management. The term “engages in an equine activity” does not include being a spectator at an equine activity, except in cases where the spectator places himself or herself in an unauthorized area and in immediate proximity to the equine activity.
- (3) “Equine” means a horse, pony, mule, donkey, or hinny.

(4) "Equine activity" means:

(A) Equine shows, fairs, competitions, performances, or parades that involve any or all breeds of equines and any of the equine disciplines, including, but not limited to, dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, English and western performance riding, endurance trail riding and western games, and hunting;

(B) Equine training or teaching activities, or both;

(C) Boarding equines;

(D) Riding, inspecting, or evaluating an equine belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine;

(E) Rides, trips, hunts, or other equine activities of any type however informal or impromptu that are sponsored by an equine activity sponsor;

(F) Placing or replacing horseshoes on an equine; and

(G) Examining or administering medical treatment to an equine by a veterinarian.

(5) "Equine activity sponsor" means an individual, group, club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for an equine activity, including, but not limited to, pony clubs; 4-H clubs; hunt clubs; riding clubs; school and college sponsored classes, programs, and activities; therapeutic riding programs; and operators, instructors, and promoters of equine facilities, including, but not limited to, stables, clubhouses, ponyride strings, fairs, and arenas at which the activity is held.

(6) "Equine professional" means a person engaged for compensation in:

(A) Instructing a participant or renting to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine;

(B) Renting equipment or tack to a participant; or

(C) Examining or administering medical treatment to an equine as a veterinarian.

(7) "Inherent risks of equine activities" or "inherent risks of llama activities" means those dangers or conditions which are an integral part

of equine activities or llama activities, as the case may be, including, but not limited to:

(A) The propensity of the animal to behave in ways that may result in injury, harm, or death to persons on or around them;

(B) The unpredictability of the animal's reaction to such things as sounds, sudden movement, and unfamiliar objects, persons, or other animals;

(C) Certain hazards such as surface and subsurface conditions;

(D) Collisions with other animals or objects; and

(E) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability.

(8) "Llama" means a South American camelid which is an animal of the genus lama, commonly referred to as a "one llama," including llamas, alpacas, guanacos, and vicunas.

(9) "Llama activity" means:

(A) Llama shows, fairs, competitions, performances, packing events, or parades that involve any or all breeds of llamas;

(B) Using llamas to pull carts or to carry packs or other items;

(C) Using llamas to pull travois-type carriers during rescue or emergency situations;

(D) Llama training or teaching activities or both;

(E) Taking llamas on public relations trips or visits to schools or nursing homes;

(F) Participating in commercial packing trips in which participants pay a llama professional to be a guide on a hike leading llamas;

(G) Boarding llamas;

(H) Riding, inspecting, or evaluating a llama belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the llama or is permitting a prospective purchaser of the llama to ride, inspect, or evaluate the llama;

(I) Using llamas in wool production;

(J) Rides, trips, or other llama activities of any type however informal or impromptu that are sponsored by a llama activity sponsor; and

(K) Trimming the nails of a llama.

(10) "Llama activity sponsor" means an individual, group, club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for a llama activity, including, but not limited to, llama clubs, 4-H clubs, hunt clubs, riding clubs, school and college-sponsored classes, programs, and activities, therapeutic riding programs, and operators, instructors, and promoters of llama facilities, including but not limited to stables, clubhouses, fairs, and arenas at which the activity is held.

(11) "Llama professional" means a person engaged for compensation:

(A) In instructing a participant or renting to a participant a llama for the purpose of riding, driving, or being a passenger upon the llama; or

(B) In renting equipment or tack to a participant.

(12) "Participant" means any person, whether amateur or professional, who engages in an equine activity or who engages in a llama activity, whether or not a fee is paid to participate in such activity. (Code 1981, § 4-12-2, enacted by Ga. L. 1991, p. 680, § 1; Ga. L. 1995, p. 335, § 2.)

The 1995 amendment, effective July 1, 1995, added paragraph (1); redesignated former paragraphs (1) through (6) as paragraphs (2) through (7); added paragraphs (8) through (11); redesignated former paragraph (7) as paragraph (12); in paragraph (2), deleted "providing or" preceding "assisting" in the first sentence and inserted "or herself" in the second sentence; in paragraph (7), inserted "or 'inherent risks

of llama activities'" and "or llama activities, as the case may be" in the introductory language, substituted "the animal" for "an equine" in subparagraph (A), substituted "the animal's" for "an equine's" in subparagraph (B), and substituted "animals" for "equines" in subparagraph (D); and, in paragraph (12), inserted "or who engages in a llama activity" and substituted "such activity" for "the equine activity".

4-12-3. Immunity from liability for injury or death; exceptions.

(a) Except as provided in subsection (b) of this Code section, an equine activity sponsor, an equine professional, a llama activity sponsor, a llama professional, or any other person, which shall include a corporation or partnership, shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities or from the inherent risks of llama activities and, except as provided in subsection (b) of this Code section, no participant or participant's representative shall make any claim against, maintain an action against, or recover from an equine activity sponsor, an equine professional, a llama activity sponsor, a llama professional, or any other person for injury, loss, damage, or death of the participant resulting from any of the inherent risks of equine activities or resulting from any of the inherent risks of llama activities.

(b) Nothing in subsection (a) of this Code section shall prevent or limit the liability of an equine activity sponsor, an equine professional, a llama activity sponsor, a llama professional, or any other person if the equine activity sponsor, equine professional, llama activity sponsor, llama professional, or person:

(1) (A) Provided the equipment or tack, and knew or should have known that the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause the injury.

(B) Provided the animal and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity or llama activity and to safely manage the particular animal based on the participant's representations of his or her ability;

(2) Owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known or should have been known to the equine activity sponsor, equine professional, llama activity sponsor, llama professional, or person and for which warning signs have not been conspicuously posted;

(3) Commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission caused the injury; or

(4) Intentionally injures the participant.

(c) Nothing in subsection (a) of this Code section shall prevent or limit the liability of an equine activity sponsor, equine professional, llama activity sponsor, or llama professional under liability provisions as set forth in the products liability laws. (Code 1981, § 4-12-3, enacted by Ga. L. 1991, p. 680, § 1; Ga. L. 1995, p. 335, § 3.)

The 1995 amendment, effective July 1, 1995, in subsection (a), inserted "a llama activity sponsor, a llama professional," in two places and "or from the inherent risks of llama activities" and added "resulting from any of the inherent risks of llama activities" at the end; in subsection (b), inserted "a llama activity sponsor, a llama professional," and "llama activity sponsor, llama professional," in the introductory language, substi-

tuted "animal" for "equine" in two places, and inserted "or llama activity" and "or her" in subparagraph (b)(1)(B) and inserted "llama activity sponsor, llama professional," in paragraph (2); and, in subsection (c), substituted the comma for "or an" preceding "equine professional" and inserted ", llama activity sponsor, or llama professional".

4-12-4. Warning required; effect of failure to comply with notice requirement.

(a) Every equine professional and every equine activity sponsor shall post and maintain signs which contain the warning notice specified in subsection (b) of this Code section. Such signs shall be placed in a clearly

visible location on or near stables, corrals, or arenas where the equine professional or the equine activity sponsor conducts equine activities. The warning notice specified in subsection (b) of this Code section shall appear on the sign in black letters, with each letter to be a minimum of one inch in height. Every written contract entered into by an equine professional or by an equine activity sponsor for the providing of professional services, instruction, or the rental of equipment or tack or an equine to a participant, whether or not the contract involves equine activities on or off the location or site of the equine professional's or the equine activity sponsor's business, shall contain in clearly readable print the warning notice specified in subsection (b) of this Code section.

(b) The signs and contracts described in subsection (a) of this Code section shall contain the following warning notice:

WARNING

Under Georgia law, an equine activity sponsor or equine professional is not liable for an injury to or the death of a participant in equine activities resulting from the inherent risks of equine activities, pursuant to Chapter 12 of Title 4 of the Official Code of Georgia Annotated.

(c) Failure to comply with the requirements concerning warning signs and notices provided in this Code section shall prevent an equine activity sponsor or equine professional from invoking the privileges of immunity provided by this chapter. (Code 1981, § 4-12-4, enacted by Ga. L. 1991, p. 680, § 1.)

4-12-5. Warning signs or notices posted by llama activity sponsors or llama professionals.

(a) Every llama professional and every llama activity sponsor shall post and maintain signs which contain the warning notice specified in subsection (b) of this Code section. Such signs shall be placed in a clearly visible location on or near stables, corrals, pens, or arenas where the llama professional or the llama activity sponsor conducts llama activities. The warning notice specified in subsection (b) of this Code section shall appear on the sign in black letters, with each letter to be a minimum of one inch in height. Every written contract entered into by a llama professional or by a llama activity sponsor for the providing of professional services, instruction, or the rental of equipment or tack or a llama to a participant, whether or not the contract involves llama activities on or off the location or site of the llama professional's or the llama activity sponsor's business, shall contain in clearly readable print the warning notice specified in subsection (b) of this Code section.

(b) The signs and contracts described in subsection (a) of this Code section shall contain the following warning notice:

WARNING

Under Georgia law, a llama activity sponsor or llama professional is not liable for an injury to or the death of a participant in llama activities resulting from the inherent risks of llama activities, pursuant to Chapter 12 of Title 4 of the Official Code of Georgia Annotated.

(c) Failure to comply with the requirements concerning warning signs and notices provided in this Code section shall prevent a llama activity sponsor or llama professional from invoking the privileges of immunity provided by this chapter. (Code 1981, § 4-12-5, enacted by Ga. L. 1995, p. 335, § 4.)

Effective date. — This Code section became effective July 1, 1995.

CHAPTER 13

HUMANE CARE FOR EQUINES

Sec.		Sec.	
4-13-1.	Short title.	4-13-6.	Notice of impoundment.
4-13-2.	Definitions.	4-13-7.	Disposal of equine by sale or euthanasia.
4-13-3.	Prohibited acts.	4-13-8.	Injunctive relief.
4-13-4.	Inspection warrants; impoundment authorized; examination.	4-13-9.	Rules and regulations.
4-13-5.	Duty to care for impounded equines; lien; return to owner.	4-13-10.	Penalty for violation of chapter.

4-13-1. Short title.

This chapter shall be known and may be cited as the "Humane Care for Equines Act." (Code 1981, § 4-13-1, enacted by Ga. L. 1992, p. 2398, § 2 and Ga. L. 1992, p. 3214, § 1.)

4-13-2. Definitions.

As used in this chapter, the term:

(1) "Adequate food and water" means food and water which is sufficient in amount and appropriate for the particular type of equine to prevent starvation, dehydration, or a significant risk to the equine's health from a lack of food or water.

(2) "Equine" means any member of the Equidae species, including horses, mules, and asses.

(3) "Humane care" means, but is not limited to, the provision of adequate food and water consistent with the normal requirements and feeding habits of the equine's size, species, and breed.

(4) "Owner" means any person owning, having possession or custody of, or in charge of an equine.

(5) "Person" means any person, firm, corporation, partnership, association, or other legal entity; any public or private institution; the State of Georgia; or any county, municipal corporation, or political subdivision of the state. (Code 1981, § 4-13-2, enacted by Ga. L. 1992, p. 2398, § 2 and Ga. L. 1992, p. 3214, § 1.)

4-13-3. Prohibited acts.

It shall be unlawful for the owner of any equine:

(1) To commit a violation of Code Section 16-12-4, relating to cruelty to animals, which involves an equine owned by, possessed by, or in the custody or control of such person;

- (2) To fail to provide adequate food and water to such equine;
- (3) To fail to provide humane care for such equine;
- (4) To unnecessarily overload, overdrive, torment, or beat any equine or to cause the death of any equine in a cruel or inhumane manner; or
- (5) To interfere with or hinder the Commissioner or his designated agent or any sheriff, deputy sheriff, or other law enforcement officer in carrying out his duties under this chapter. (Code 1981, § 4-13-3, enacted by Ga. L. 1992, p. 2398, § 2 and Ga. L. 1992, p. 3214, § 1.)

4-13-4. Inspection warrants; impoundment authorized; examination.

(a) At any time there is cause to believe that a violation of Code Section 4-13-3 has occurred, the Commissioner of Agriculture or his designated agent may apply to the appropriate court in the county in which the equine is located for an inspection warrant under the provisions of Code Section 2-2-11 or any sheriff, deputy sheriff, or other law enforcement officer may apply for a search warrant for the purpose of inspecting any equine found on such property to determine if a violation of Code Section 4-13-3 has occurred.

(b) The Commissioner or his designated agent or any sheriff, deputy sheriff, or other law enforcement officer is authorized to impound any equine which has not been furnished with adequate food and water, which has not received humane care, or which has been subjected to cruelty in violation of Code Section 4-13-3. Such determination as to the condition or treatment of the equine shall be made by a licensed veterinarian employed by the state or federal government following an examination conducted at the request of the Commissioner or his designated agent or any sheriff, deputy sheriff, or other law enforcement officer. (Code 1981, § 4-13-4, enacted by Ga. L. 1992, p. 2398, § 2 and Ga. L. 1992, p. 3214, § 1.)

4-13-5. Duty to care for impounded equines; lien; return to owner.

(a) It shall be the duty of any person designated for impounding an equine under Code Section 4-13-4 to make reasonable and proper arrangements to provide the impounded equine with adequate and necessary shelter, food, water, veterinary services, and humane care and to take such actions as to ensure the survival of the equine or the humane euthanasia of the equine and disposal thereof if such actions are necessary. Such arrangements may include, but shall not be limited to, providing shelter and care for the equine at any state, federal, county, municipal, or governmental facility or shelter, contracting with a private individual, partnership, corporation, association, or other entity to provide shelter, food, water, veterinary services, and humane care for a reasonable fee, or allowing a private individual, partnership, corporation, association, or other

entity to provide shelter, food, water, veterinary services, and humane care as a volunteer and at no cost. Any person impounding an equine under this chapter or providing care for an impounded equine shall have a lien on such equine for the reasonable costs of caring for such equine.

(b) The lien acquired under subsection (a) of this Code section may be foreclosed in any court which is competent to hear civil cases, including, but not limited to, magistrate courts. Liens shall be foreclosed in magistrate courts only when the amount of the lien does not exceed the jurisdictional limits established by law for such courts.

(c) Any person impounding an equine under this chapter is authorized to return the equine to its owner upon payment by the owner of all costs of impoundment and care and upon the entry of a consent order or receiving written assurances:

(1) That such equine will be given humane care, adequate food and water, adequate shelter, and veterinary services;

(2) That such equine will not be subjected to cruelty; and

(3) That the owner will comply with this chapter. (Code 1981, § 4-13-5, enacted by Ga. L. 1992, p. 2398, § 2 and Ga. L. 1992, p. 3214, § 1.)

4-13-6. Notice of impoundment.

It shall be the duty of any person impounding an equine under this chapter to notify the owner of such equine immediately upon impoundment. Such notice shall state the name and address of the person impounding the equine, the location where the equine is being held, and a description of the equine. If the owner of such equine is unknown or cannot be found, service of the notice on the owner shall be obtained by publishing a notice once in a newspaper of general circulation where the equine is impounded. (Code 1981, § 4-13-6, enacted by Ga. L. 1992, p. 2398, § 2 and Ga. L. 1992, p. 3214, § 1.)

4-13-7. Disposal of equine by sale or euthanasia.

If the owner of the equine cannot be found, if the owner refuses to enter into a consent order or to provide a written assurance that such equine will be given humane care and adequate food, water, shelter, and veterinary care, or if the owner fails to comply with this chapter after having entered into a consent order or having given a written assurance on a previous occasion, the Commissioner or his designated agent, the sheriff, any deputy sheriff, or any other law enforcement officer may dispose of the equine through sale at a public auction or by sealed bids or, if such equine is in a physical condition such that euthanasia is the only reasonable course of

action, by humanely disposing of the equine. Prior to disposing of an equine through sale or euthanasia, the Commissioner or his designated agent, the sheriff, any deputy sheriff, or any other law enforcement officer shall make a reasonable effort to locate the owner and, if the owner cannot be located after reasonable effort, the sale or euthanasia may proceed. Any proceeds from the sale of such equine shall be used first to pay the costs of care given the equine and any funds remaining shall be paid into the state treasury if the equine was impounded by the Commissioner or his designated agent or into the county treasury if the equine was impounded by the sheriff, a deputy sheriff, or other law enforcement officer. (Code 1981, § 4-13-7, enacted by Ga. L. 1992, p. 2398, § 2 and Ga. L. 1992, p. 3214, § 1.)

4-13-8. Injunctive relief.

In addition to the remedies provided in this chapter or elsewhere in the laws of this state and notwithstanding the existence of an adequate remedy at law, the Commissioner is authorized to apply to the superior courts for an injunction or restraining order. Such courts shall have jurisdiction and for good cause shown shall grant a temporary or permanent injunction or an ex parte or restraining order restraining or enjoining any person, partnership, firm, corporation, or other entity from violating and continuing to violate this chapter or any rules and regulations promulgated under this chapter. Such injunction or restraining order shall be issued without bond and may be granted notwithstanding the fact that the violation constitutes a criminal act and notwithstanding the pendency of any criminal prosecution for the same violation. (Code 1981, § 4-13-8, enacted by Ga. L. 1992, p. 2398, § 2 and Ga. L. 1992, p. 3214, § 1.)

4-13-9. Rules and regulations.

The Commissioner is authorized to promulgate and adopt rules and regulations necessary or appropriate to carry out this chapter. (Code 1981, § 4-13-9, enacted by Ga. L. 1992, p. 2398, § 2 and Ga. L. 1992, p. 3214, § 1.)

4-13-10. Penalty for violation of chapter.

Any person, partnership, firm, corporation, or other entity violating any of the provisions of this chapter shall be guilty of a misdemeanor. (Code 1981, § 4-13-10, enacted by Ga. L. 1992, p. 2398, § 2 and Ga. L. 1992, p. 3214, § 1.)

CHAPTER 14

STERILIZATION OF DOGS AND CATS IN SHELTERS

Sec.		Sec.	
4-14-1.	Legislative findings and policy.	4-14-4.	Penalty for noncompliance.
4-14-2.	Definitions.	4-14-5.	Adoption of stricter shelter policies.
4-14-3.	Sterilization of dogs and cats required; exceptions; costs.		

Effective date. — This chapter became effective July 1, 1994.

4-14-1. Legislative findings and policy.

The General Assembly finds that the breeding of dogs and cats acquired from public or private animal shelters, animal control agencies operated by political subdivisions of this state, humane societies, or public or private animal refuges in the State of Georgia results in the birth of thousands of animals who become strays, suffer privation and death, constitute a public nuisance and health hazard, and, ultimately, are impounded and destroyed at great public expense. It is therefore declared to be the public policy of this state that preventing the breeding of dogs and cats acquired from such shelters, animal control agencies, humane societies, or public or private animal refuges be encouraged. (Code 1981, § 4-14-1, enacted by Ga. L. 1994, p. 999, § 1.)

4-14-2. Definitions.

As used in this chapter, the term:

(1) "Animal shelter" means any facility operated by or under contract for the state or any county, municipal corporation, or other political subdivision of the state for the purpose of impounding or harboring seized, stray, homeless, abandoned, or unwanted dogs, cats, and other animals; any veterinary hospital or clinic operated by a veterinarian or veterinarians which operates for such purpose in addition to its customary purposes; and any facility operated, owned, or maintained by a duly incorporated humane society, animal welfare society, or other nonprofit organization for the purpose of providing for and promoting the welfare, protection, and humane treatment of animals.

(2) "Humane society" means any unincorporated nonprofit organization existing for the purpose of prevention of cruelty to animals.

(3) "Public or private animal refuge" means harborers of unwanted animals of any breed, including crossbreeds, who provide food, shelter,

and confinement for a group of dogs, a group of cats, or a combination of dogs and cats.

(4) "Sexually mature animal" means any dog or cat that has reached the age of 180 days or six months or more.

(5) "Sterilization" means the surgical removal of the reproductive organs of a dog or cat in order to render the animal unable to reproduce. (Code 1981, § 4-14-2, enacted by Ga. L. 1994, p. 999, § 1.)

4-14-3. Sterilization of dogs and cats required; exceptions; costs.

(a) Any public or private animal shelter, animal control agency operated by a political subdivision of this state, humane society, or public or private animal refuge shall make provisions for the sterilization of all dogs or cats acquired from such shelter, agency, society, or refuge by:

(1) Providing sterilization by a licensed veterinarian before relinquishing custody of the animal; or

(2) Entering into a written agreement with the person acquiring such animal guaranteeing that sterilization will be performed by a licensed veterinarian within 30 days after acquisition of such animal in the case of an adult animal or within 30 days of the sexual maturity of the animal in the case of an immature animal;

provided, however, that the requirements of this Code section shall not apply to any privately owned animal which any such shelter, agency, society, or refuge may have in its possession for any reason if the owner of such animal claims or presents evidence that such animal is the property of such person.

(b) All costs of sterilization pursuant to this Code section shall be the responsibility of the person acquiring such animal and, if performed prior to acquisition, may be included in any fees charged by the shelter, agency, society, or refuge for such animal.

(c) Any person acquiring an animal from a public or private animal shelter, animal control agency operated by a political subdivision of this state, humane society, or public or private animal refuge, which animal is not sterile at the time of acquisition, shall submit to the animal shelter, animal control agency, humane society, or public or private animal refuge a signed statement from the licensed veterinarian performing the sterilization required by paragraph (2) of subsection (a) of this Code section within seven days after such sterilization attesting that such sterilization has been performed.

(d) Every public or private animal shelter, animal control agency operated by a political subdivision of this state, humane society, or public or private animal refuge selling or offering for sale or exchange any dog or cat

shall maintain and furnish to any person acquiring an animal from such shelter, agency, society, or refuge a current list of veterinarians licensed in this state who have notified the shelter, agency, society, or refuge that they are willing to perform sterilizations and the cost for such procedures. (Code 1981, § 4-14-3, enacted by Ga. L. 1994, p. 999, § 1.)

4-144. Penalty for noncompliance.

It shall be a misdemeanor to fail or refuse to comply with the requirements of Code Section 4-14-3 and any person convicted of said misdemeanor shall be subject to a fine not to exceed \$200.00. (Code 1981, § 4-14-4, enacted by Ga. L. 1994, p. 999, § 1.)

4-145. Adoption of stricter shelter policies.

This chapter shall not prohibit the adoption by any political subdivision of this state of shelter policies which are more stringent than the requirements of this chapter. (Code 1981, § 4-14-5, enacted by Ga. L. 1994, p. 999, § 1.)

TITLE 5

APPEAL AND ERROR

- Chap. 1. General Provisions, Reserved.
2. Appeals to Jury in Justice of the Peace Court, 5-2-1 through 5-2-6.
[Repealed]
 3. Appeals to Superior Court, 5-3-1 through 5-3-31.
 4. Certiorari to Superior Court, 5-4-1 through 5-4-20.
 5. New Trial, 5-5-1 through 5-5-51.
 6. Certiorari and Appeals to Appellate Courts Generally, 5-6-1 through 5-6-51.
 7. Appeal or Certiorari by State in Criminal Cases, 5-7-1 through 5-7-5.

Cross references. — Right of appeal from confession of judgment, § 9-12-18. Appeals from decisions of judge of superior court in cases involving acquisition of property by state, counties, and municipalities for public road construction and other transportation purposes, § 32-3-14 et seq. Judicial review and subsequent appeal of decisions of ad-

ministrative bodies, §§ 50-13-19, 50-13-20. Requirement of expeditious determination of actions and appeals involving challenges to public improvements, projects, or facilities, § 50-15-3.

Law reviews. — For article discussing developments in Georgia criminal law in 1976 to 1977, see 29 Mercer L. Rev. 55 (1977).

JUDICIAL DECISIONS

Statute providing for appeal but prescribing no procedure for doing so. — Where statute provides for appeal in certain cases and entirely fails to prescribe manner in which appeals are to be entered in class of

cases it deals with, appellant is relegated to processes provided under general law. *Rogers v. Anderson*, 95 Ga. App. 637, 98 S.E.2d 388 (1957).

APPEAL AND ERROR

CHAPTER 1

GENERAL PROVISIONS

Reserved

APPEALS IN JUSTICE OF THE PEACE COURT

CHAPTER 2

APPEALS TO JURY IN JUSTICE OF THE PEACE COURT

Sec.

5-2-1 through 5-2-6 [Repealed].

5-2-1 through 5-2-6.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — These Code sections were based on Orig. Code 1863, §§ 4069, 4070, 4082; Code 1868, §§ 4098, 4099, 4111; Ga. L. 1878-79, p. 153, §§ 1 — 6; Ga. L. 1878-79, p. 190, § 1; Code 1882, §§ 4157a — 4157f, 4157i; Ga. L. 1882-83, p. 64, § 1; Ga.

L. 1882-83, p. 95, § 1; Civil Code 1895, §§ 4140 — 4147; Civil Code 1910, §§ 4740 — 4747; Ga. L. 1921, p. 116, § 1; Code 1933, §§ 6-304, 6-401 — 6-407; Ga. L. 1953, Nov.-Dec. Sess., p. 312, § 1.

CHAPTER 3

APPEALS TO SUPERIOR COURT

Article 1		Article 2	
General Provisions		Procedure	
Sec.		Sec.	
5-3-1.	Right of appeal from county courts and justice of the peace courts [Repealed].	5-3-20.	Time for filing appeals.
5-3-2.	Right to appeal from probate courts; exception.	5-3-21.	Notice of appeal; form; service.
5-3-3.	Persons by whom appeal may be entered generally; attorney's authority to appeal to be in writing; dismissal for failure to file same; ratification of unauthorized appeal.	5-3-22.	Payment of costs prerequisite to appeal; affidavit of indigence; dismissal for nonpayment following court order; supersedeas bond.
5-3-4.	Appeal by one of several plaintiffs or defendants — Authorization and procedure generally.	5-3-23.	Signature on bond of attorney at law or in fact.
5-3-5.	Appeal by one of several plaintiffs or defendants — Effect of judgment on appeal generally; recovery of damages awarded upon appeal.	5-3-24.	Exemption of executors, administrators, and trustees from paying costs and giving bond.
5-3-6.	Appeal by one of several plaintiffs or defendants — Liability and recourse of surety on judgment on appeal.	5-3-25.	Appeal by partners or joint contractors; signature on bond; appeal by corporation.
5-3-7.	Appeal suspends judgment; effect of dismissal or withdrawal of appeal.	5-3-26.	Requirement of written defenses in appeal from justice of the peace court; right to amend pleadings [Repealed].
5-3-8.	Requirement of consent to withdrawal of appeal.	5-3-27.	Amendments to cure defects.
		5-3-28.	Transmittal of record and transcripts to superior court; issuance of orders and writs.
		5-3-29.	De novo investigation.
		5-3-30.	Term of trial in superior or state court; waiver of trial by jury.
		5-3-31.	Damages assessed for frivolous appeals.

Cross references. — See Ga. Const. 1983, Art. VI, Sec. IV, Para. I. As to procedure for appeals from decisions of superior court reviewing decisions of lower courts on appeal, see § 5-6-35. As to appeals to superior court from final action of Department of Banking and Finance, see § 7-1-90. As to description of extent of authority of superior court to exercise appellate jurisdiction and to exercise general supervision over all inferior tribunals, see § 15-6-8. As to appeal to superior court from decision of tribunal established to hear matters relating to construction or administration of school law, see § 20-2-1160. As to appeals to superior court

from decisions of registration officers denying right of voter registration, see §§ 21-2-224, 21-3-129. As to appeal to jury in superior court from decision of assessors in condemnation proceedings, see § 22-2-80 et seq. As to appeal to superior court from award of special master in condemnation proceeding, see § 22-2-112. As to right of appeal to superior court from convictions for traffic offenses, see § 40-13-28. As to appeal to superior court from decision of State Board of Equalization, see § 48-2-18. As to appeal to superior court from orders, rulings, or findings of state revenue commissioner, see § 48-2-59. As to appeal to supe-

rior court from final decision by administrative agency in contested case, see § 50-13-19.

JUDICIAL DECISIONS

Chapter 11 of Title 9 does not deal with appellate court powers. — Scope of Ch. 11, T. 9 is procedure in trial courts of record, and its rules do not deal with powers of appellate courts. Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos., 116 Ga. App. 503, 157 S.E.2d 767 (1967).

Applicability. — Appeals which may be taken to superior courts are limited by this chapter. Walton County v. Scenic Hills Estates, Inc., 261 Ga. 94, 401 S.E.2d 513 (1991).

RESEARCH REFERENCES

ALR. — Power of legislature to require appellate court to review evidence, 19 ALR 744; 24 ALR 1267; 33 ALR 10.
Amendment in appellate court increasing amount claimed beyond, or reducing amount claimed to, jurisdiction of court below, 168 ALR 641.

Defeated party's payment or satisfaction of, or other compliance with, civil judgment as barring his right to appeal, 39 ALR2d 153.
Appealability of state court's order granting or denying motion to disqualify attorney, 5 ALR4th 1251.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Right of appeal from cases in the justice of peace courts, Ga. Const. 1983, Art. VI, Sec. I, Para. V.
Editor's notes. — The following annotations

are to former Code Section 5-3-1, which was repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICABILITY

- 1. IN GENERAL
- 2. DISTINCTION BETWEEN APPEAL AND CERTIORARI

AMOUNT CLAIMED
JURISDICTION
PROCEDURAL ISSUES

General Consideration

Right to appeal to superior court is fixed by statute, and lies only from bodies or tribunals when appeal therefrom is provided by statute. Georgia Power Co. v. Friar, 47 Ga. App. 675, 171 S.E. 210 (1933), aff'd, 179 Ga. 470, 175 S.E. 807 (1934).
Where amount claimed is over \$50.00 section confers right to appeal to superior court. Humphrey v. Johnson, 13 Ga. App.

557, 79 S.E. 530 (1913).
Where amount in controversy is \$50.00 or less, appeal will not lie as matter of right. Gay v. Brown, 45 Ga. App. 862, 166 S.E. 374 (1932).
Under section, party may appeal to jury in superior court. Hendrix & McBurney v. Mason, 70 Ga. 523 (1883); Southern Express Co. v. Hilton, 94 Ga. 450, 20 S.E. 126 (1894); Wood v. McCrary, 107 Ga. 345, 33 S.E. 395 (1899).

General Consideration (Cont'd)

Parties may appeal by consent from justice court to superior court when amount involved is sufficient to authorize appeal. *Smith v. Rawson*, 61 Ga. 208 (1878).

General statutory meaning of appeal from inferior court to superior court is that, after having been tried in inferior court, jurisdiction of entire case is transferred to superior court for another complete trial. *Hartley v. Holwell*, 202 Ga. 724, 44 S.E.2d 896 (1947).

Sections dealing with appeals to superior court from inferior courts are in pari materia. — In case of appeal from ordinary's court (now probate court) to superior court, the various sections relating to appeals to superior court from justice's courts, county courts, and courts of ordinary are in pari materia, and should be construed as providing for a single system of appellate procedure. *Wofford v. Vandiver*, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

Assumption of failure in whole or part to obtain relief sought. — Right given to party to appeal from judgment in justice's court is predicated on assumption that by judgment complained of appellant has failed entirely in suit or has failed to recover full amount sued for, as to hold otherwise would be to run counter to well-settled principle that no one will be heard to complain of a judgment, unless he has been injured or is aggrieved thereby. *Walker v. Hartford Accident & Indem. Co.*, 196 Ga. 361, 26 S.E.2d 695 (1943).

Party not aggrieved by judgment of trial court is without legal right to except thereto, since he has of it no just cause of complaint. *Walker v. Hartford Accident & Indem. Co.*, 196 Ga. 361, 26 S.E.2d 695 (1943).

When party is aggrieved by judgment or decree. — Substance of judgment, and not opinion of party, determines whether or not he is aggrieved. *Walker v. Hartford Accident & Indem. Co.*, 196 Ga. 361, 26 S.E.2d 695 (1943).

A party is aggrieved by a judgment or decree when it operates on his rights of property, or bears directly upon his interest. *Walker v. Hartford Accident & Indem. Co.*, 196 Ga. 361, 26 S.E.2d 695 (1943).

Appeal from confession of judgment. — Appeal can be made from confession of judgment without formal entering of judgment

by justice. *Huff v. Whitner, Manry & Co.*, 8 Ga. App. 25, 68 S.E. 463 (1910).

Parallel between appeal granted by section and other sections. — By comparing sections, which are in pari materia, substantially the same procedure is provided in cases of appeal from award of assessors in condemnation proceeding to superior court as is provided in cases of appeal from justice's court to superior court. *State Hwy. Bd. v. Long*, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

Cited in *Armstrong v. Hand*, 36 Ga. 267 (1867); *Little v. Thompson*, 39 Ga. 658 (1869); *Brown v. Robinson*, 91 Ga. 275, 18 S.E. 156 (1893); *Central of Ga. Ry. v. Howard*, 112 Ga. 917, 38 S.E. 338 (1901); *Robinson v. McAlpin*, 130 Ga. 489, 61 S.E. 115 (1908); *Crawford County Bank v. Critt-Hightower Co.*, 17 Ga. App. 804, 88 S.E. 691 (1916); *Slocumb v. Ross*, 119 Ga. App. 567, 168 S.E.2d 208 (1969); *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Applicability**1. In General**

Defendant may appeal though defenses stricken in county court. — Where suit is brought in county court for sum exceeding \$50.00 in amount, which results, upon trial, in judgment for plaintiff, defendant may enter appeal to superior court even though defenses interposed by him in county court were stricken. *Helmly v. Davis*, 100 Ga. 493, 28 S.E. 231 (1897).

Appeal of wrongfully dismissed case. — Where case is dismissed when judgment for defendant should have been entered, plaintiff may appeal. *Hollis v. Doster*, 113 Ga. 115, 38 S.E. 308 (1901).

Section inapplicable to proceeding in county court to evict intruder; certiorari is proper remedy. *Rigell v. Sirmans*, 123 Ga. 455, 51 S.E. 381 (1905).

2. Distinction Between Appeal and Certiorari

General rules. — Certiorari will not lie where there are issues of fact involved. *McDonald v. Dickens*, 58 Ga. 77 (1877).

In cases of law, certiorari is proper remedy, in cases of fact, appeal is proper. *Rogers v. Bennett*, 78 Ga. 707, 3 S.E. 660 (1887).

If in case in county court, amount in controversy is more than \$50.00 and case involves question of fact, appeal is proper remedy; if no question of fact is involved, but case rests solely on questions of law, certiorari is proper remedy. *Small v. Sparks & Son*, 69 Ga. 745 (1882).

Right of appeal presupposes issue to be tried by jury. *Small v. Sparks & Son*, 69 Ga. 745 (1882).

Distinction between statutory appeal and appeal by writ of error. — Statutory appeal providing for another trial in appellate court on merits of case is altogether different from writ of error on appeal for correction of errors in trial eventuating in judgment from which appeal is taken. In latter proceeding inquiry is into correctness of judgment upon pleading and evidence before trial court. The appellate court affirms or reverses in whole or in part the judgment on review and certifies result to trial court, where final judgment is entered. That procedure has nothing in common with that of a statutory appeal. The statutory appeal allows litigants in certain cases the right to another trial in superior court upon compliance with certain requisites. The trial in superior court is had without reference to evidence introduced in former trial, and is a *de novo* investigation. *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934).

Garnishment proceedings. — Certiorari is proper remedy for error in judgment in proceeding seeking strengthening of attachment or garnishment bond. *Gregory v. Clark*, 73 Ga. 542 (1884).

Amount Claimed

Amount claimed determines right of appeal. *Gay v. Brown*, 45 Ga. App. 862, 166 S.E. 374 (1932).

Where no amount claimed, appeal to superior court will not lie. *Humphrey v. Johnson*, 13 Ga. App. 557, 79 S.E. 530 (1913).

It is amount claimed, and not amount recovered, which determines right of party to appeal. *Taylor v. Blasingame*, 73 Ga. 111 (1884); *Helmly v. Davis*, 100 Ga. 493, 28 S.E. 231 (1897).

Pleadings control in determining amount claimed. *Singer Mfg. Co. v. Martin*, 75 Ga. 570 (1885); *Simmons v. Allen*, 26 Ga. App. 725, 106 S.E. 811 (1921).

Method of determining amount claimed.

— Amount claimed is determined by adding principal and interest together. *Bell v. Morton*, 68 Ga. 831 (1882); *Magarahan v. Wright & Lamkin*, 83 Ga. 773, 10 S.E. 584 (1889).

Interest. — In determining amount claimed, interest cannot be waived. *McDonald v. Dickens*, 58 Ga. 77 (1877); *Howard v. Chamberlin, Boynton & Co.*, 64 Ga. 686 (1880).

Reductions at trial cannot be considered in determining amount claimed. *Bell v. Davis*, 93 Ga. 233, 18 S.E. 647 (1893).

Amount of execution or value of property.

— In claim cases, amount of execution or value of property determines right of appeal. *Turman v. Cargill & Daniel*, 54 Ga. 663 (1875); *Napier Bros. v. Woodall*, 118 Ga. 830, 45 S.E. 684 (1903); *Adkins v. Bennett*, 138 Ga. 118, 74 S.E. 838 (1912).

Reasonable attorney's fees, recoverable by statute, are considered. — In suit in justice's court, where plaintiff, as beneficiary in life insurance policy, brought suit against insurer to recover in sum of \$30.00, representing amount due plaintiff under terms of policy, \$7.50 representing 25 percent of amount sued for as damages, and \$50.00 representing reasonable attorney's fees as provided in § 33-4-6 which authorizes recovery for damages and attorney's fees where insurer has acted in bad faith in failing to pay amount due under policy within required time, amount sued for and claimed in suit was in excess of \$50.00. *Tate v. Industrial Life & Health Ins. Co.*, 58 Ga. App. 305, 198 S.E. 303 (1938).

Costs of suit may be added to amount claimed. — Where amount claimed by plaintiff in garnishment proceedings was \$49.60 and \$2.75 costs in suit in justice court and judgment was obtained against defendant, amount in controversy between garnishees, appellants, plaintiff, and appellee, was \$52.35, and the superior court judge erred in dismissing appeal as being one in controversy involving \$50.00 or less. *Gay v. Brown*, 45 Ga. App. 862, 166 S.E. 374 (1932).

Attachment proceedings. — Appeal lies where attachment for more than \$50.00 is levied on property worth less than \$50.00, followed by verdict for less than said amount. *Padgett v. Ford*, 117 Ga. 508, 43 S.E. 1002 (1903).

Jurisdiction

Appeal imparts same jurisdiction as was possessed by county court. — In trying appeal from county court, superior court can reach no result which could not have been reached in county court had case been finally disposed of there; hence on trial of such appeal superior court cannot entertain an equitable petition offered by defendant as an amendment to plea of general issue, which petition contemplates and prays for relief which only a court of equity, or a court of law exercising full equity powers, could administer, such as rescission of contracts, cancellation of promissory notes, injunction, etc. *Goodman v. Little*, 213 Ga. 178, 97 S.E.2d 567 (1957).

In trying appeal from county court, superior court can deal with no question of merits except as could have been raised in county court, and can render no final judgment except such as county court had jurisdiction to render. *Greer v. Burnam*, 69 Ga. 734 (1882); *Hufbauer v. Jackson*, 91 Ga. 298, 18 S.E. 159 (1893).

Amendability of summons on appeal. — When case is on appeal in superior court from justice's court, any amendment of summons whether in matter of form or of substance, may be made, which could have been made while case was pending in primary court; the only restriction on either court is that there must be enough to amend by. *Wofford v. Vandiver*, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

Procedural Issues

Appellant recognizes validity of summons and judgment by entering appeal to superior court. *Twitty v. Bower*, 84 Ga. 751, 11 S.E. 354 (1890).

Judgment appealed from need not be set forth in appeal. *Georgia, F. & A. Ry. v. Penn Tobacco Co.*, 9 Ga. App. 840, 72 S.E. 443 (1911).

Defenses allowed by oral plea must be reduced to writing on appeal. — In justice's court, which is not a court of record, many defenses are allowed to be made by oral plea, and on appeal to superior court these defenses are required to be reduced to writing before case proceeds to trial. *Wofford v. Vandiver*, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

New trial is upon prior pleadings and defenses subject to amendment. — In appeal from county court to superior court, trial of the case is a de novo proceeding, but it by no means follows that pleadings and defenses in the case are to begin over again in the new trial; on the contrary, the new trial is had on papers connected with the case when judgment was rendered, subject to proper amendment. *Wofford v. Vandiver*, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

Motion to dismiss summons may be made in superior court after appeal for de novo trial following trial in justice court. *Furman v. Smith*, 106 Ga. App. 742, 128 S.E.2d 641 (1962).

RESEARCH REFERENCES

ALR. — Who entitled to appeal from decree admitting will to probate or denying probate, 88 ALR 1158.

Change of law after decision of lower court as affecting decision on appeal or error, 111 ALR 1317; 151 ALR 987.

Fault or omission of justice of peace regarding bond, undertaking, or recognition, as affecting party seeking appeal, 117 ALR 1386.

Amendment in appellate court increasing amount claimed beyond, or reducing amount claimed to, jurisdiction of court below, 168 ALR 641.

Appealability of ruling on demurrer to plea, answer, or reply, 171 ALR 1433.

Inadequacy of verdict as ground of com-

plaint by party against whom it is rendered, 174 ALR 765.

Questions or legal theories affecting trust estates as subject to consideration on appeal though not raised below, 11 ALR2d 317.

Right of mother of illegitimate child to appeal from order or judgment entered in bastardy proceedings, 18 ALR2d 948.

Appealability of order overruling or sustaining motion to quash or set aside service of process, 30 ALR2d 287.

Appealability of order pertaining to pre-trial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Plea of guilty in justice of the peace or

similar inferior court as precluding appeal, 42 ALR2d 995.

Counterclaim or the like as affecting appellate jurisdictional amount, 58 ALR2d 84.

Jurisdictional amount for appellate review as affected by payment or tender, or by settlement, 58 ALR2d 166.

Jurisdictional amount for appellate review as affected by plaintiff's abandonment of claim, wholly or in part, 58 ALR2d 177.

Ruling on motion to quash execution as ground of appeal or writ of error, 59 ALR2d 692.

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 ALR2d 158.

Appealability of order relating to forfeiture of bail, 78 ALR2d 1180.

Appealability of order relating to transfer, on jurisdictional grounds, of cause from one state court to another, 78 ALR2d 1204.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 88 ALR2d 1275.

Appealability of order entered in connection with pretrial conference, 95 ALR2d 1361.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances, 35 ALR3d 520.

Right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance — modern status, 11 ALR4th 399.

5-3-1. Right of appeal from county courts and justice of the peace courts.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — This Code section was based on Orig. Code 1863, § 3529; Code 1868, § 3552; Ga. L. 1868, p. 131, § 2; Ga. L. 1871-72, p. 288, § 5; Ga. L. 1872, p. 40, § 1;

Code 1873, § 3610a; Ga. L. 1874, p. 85, § 1; Code 1882, § 3610a; Civil Code 1895, § 4453; Civil Code 1910, § 4998; Code 1933, § 6-101.

5-3-2. Right to appeal from probate courts; exception.

(a) An appeal shall lie to the superior court from any decision made by the probate court, except an order appointing a temporary administrator.

(b) Notwithstanding subsection (a) of this Code section, no appeal from the probate court to the superior court shall lie from any civil case in a probate court which is provided for by Article 6 of Chapter 9 of Title 15. (Laws 1805, Cobb's 1851 Digest, p. 283; Laws 1823, Cobb's 1851 Digest, p. 497; Ga. L. 1851-52, p. 49, § 1; Ga. L. 1851-52, p. 91, § 19; Ga. L. 1859, p. 33, § 5; Code 1863, § 3530; Ga. L. 1866, p. 24, § 1; Code 1868, § 3553; Code 1873, § 3611; Code 1882, § 3611; Civil Code 1895, § 4454; Civil Code 1910, § 4999; Code 1933, § 6-201; Ga. L. 1972, p. 738, § 6; Ga. L. 1986, p. 982, § 1.)

Cross references. — See Ga. Const. 1983, Art. VI, Sec. I, Para. VI.

Editor's notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

Law reviews. — For annual survey on trial practice and procedure, see 38 Mercer L. Rev. 383 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICABILITY

1. IN GENERAL

2. DISTINCTION BETWEEN APPEAL AND CERTIORARI

JURISDICTION

EFFECT OF APPEAL

General Consideration

Applicability. — This section is general, and applies to all cases. *Goodwyn v. Veal*, 50 Ga. App. 657, 179 S.E. 126 (1935).

This Code section applies only to final judgments rendered by the probate court. *Sears v. State*, 196 Ga. App. 207, 396 S.E.2d 1 (1990).

Appeal granted under section extends to any interested party. — Any interested party, dissatisfied with judgment of court of ordinary (now probate court) may appeal, except in cases involving removal of a guardian. *Hobbs v. Cody*, 45 Ga. 478 (1872).

Creditor served by citation becomes party to proceeding, and may appeal under section if he is dissatisfied with appointment of administrator by ordinary (now judge of probate court), whether he objects in court or not. *Mitchell v. Pyron*, 17 Ga. 416 (1855).

General statutory meaning of appeal from inferior court to superior court is that, after having been tried in inferior court, jurisdiction of entire case is transferred to superior court for another complete trial. *Hartley v. Holwell*, 202 Ga. 724, 44 S.E.2d 896 (1947).

Sections dealing with appeals to superior court from inferior courts are in pari materia. — In case of appeal from ordinary's court (now probate court) to superior court, the various Code sections relating to appeals to superior court from justice's courts, county courts, and courts of ordinary are in pari materia, and should be construed as providing for a single system of appellate procedure. *Wofford v. Vandiver*, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

Effect on probate court's original jurisdiction over probate of wills. — Section was not intended to invade original jurisdiction of courts of ordinary (now probate courts) granted by Ga. Const. 1976, Art. VI, Sec. VI, Para. I (see Ga. Const. 1983, Art. VI, Sec. I, Para. I) and § 53-3-1 over probate of wills.

Hartley v. Holwell, 202 Ga. 724, 44 S.E.2d 896 (1947).

Appeal to superior court with waiver of judgment of probate court. — Where appraisers filed their return for year's support, objections thereto were filed and matter was appealed by consent to superior court, and judgment of court of ordinary (now judge of probate court) was thereby expressly waived; such express waiver had same legal effect as formal decision or judgment of court of ordinary (now probate court) as to matter at issue, and status of widow as to vesting of her title was same as if decision or judgment had been formally rendered. *Tilley v. King*, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

In no case, except by consent of parties, can an appeal be entered from court of ordinary (now judge of probate court) to superior court until after judgment has been rendered in case by court of ordinary. *Bates v. Weaver*, 145 Ga. 241, 88 S.E. 986 (1916) (decided under former Code 1910, § 5011).

Forwarding of lower court original pleadings. — It is duty of ordinary (now judge of probate court) to send to clerk of superior court the original pleadings. *Robinson v. McAlpin*, 130 Ga. 489, 61 S.E. 115 (1908) (decided under former Code 1895, § 4467).

Failure to send up certificate that appellant has paid costs not ground for dismissal of appeal. *Morgan v. Campbell*, 133 Ga. 549, 66 S.E. 369 (1909) (decided under former Code 1895, § 4467).

This section does not require that ordinary (now judge of probate court) send up with appeal papers a certificate or other evidence showing that appellant has paid costs which accrued in trial of case. *Morgan v. Campbell*, 133 Ga. 549, 66 S.E. 369 (1909) (decided under former Code 1895, § 4466).

Cited in *Baber v. Woods*, 39 Ga. 643 (1869); *Redd v. Dure*, 40 Ga. 389 (1869); *Fite v. Black*, 85 Ga. 413, 11 S.E. 782 (1890);

Brodhead v. Shoemaker, 44 Ga. 518, 11 L.R.A. 567 (N.D. Ga. 1890); Ford v. Redfearn, 145 Ga. 498, 89 S.E. 611 (1916); Head v. Waldrup, 193 Ga. 165, 17 S.E.2d 585 (1941); Forrester v. Pullman Co., 66 Ga. App. 745, 19 S.E.2d 330 (1942); Bethea County v. Dixon, 72 Ga. App. 384, 33 S.E.2d 723 (1945); Whitehurst v. Singletary, 77 Ga. App. 811, 50 S.E.2d 80 (1948); Jones v. Cannady, 78 Ga. App. 453, 51 S.E.2d 551 (1949); Gray v. Gunby, 206 Ga. 63, 55 S.E.2d 588 (1949); Harnesberger v. Davis, 86 Ga. App. 41, 70 S.E.2d 615 (1952); May v. Hadden, 211 Ga. 84, 84 S.E.2d 65 (1954); Goodman v. Little, 213 Ga. 178, 97 S.E.2d 567 (1957); Brumbelow v. Brumbelow, 111 Ga. App. 665, 142 S.E.2d 855 (1965); Burson v. Bishop, 117 Ga. App. 602, 161 S.E.2d 518 (1968); State Bd. of Equalization v. Pineland Tel. Coop., 135 Ga. App. 796, 219 S.E.2d 1 (1975); Mathews v. Mathews, 136 Ga. App. 833, 222 S.E.2d 609 (1975); Montgomery v. DeKalb Steel, Inc., 144 Ga. App. 191, 240 S.E.2d 741 (1977); Hunter v. Hunter, 149 Ga. App. 324, 254 S.E.2d 477 (1979); Brown v. Frachiseur, 247 Ga. 463, 277 S.E.2d 16 (1981); Kariuki v. DeKalb County, 253 Ga. 713, 324 S.E.2d 450 (1985); Copeland v. White, 178 Ga. App. 644, 344 S.E.2d 436 (1986); Hunt v. Henderson, 178 Ga. App. 688, 344 S.E.2d 470 (1986); Smith v. Watts, 181 Ga. App. 524, 352 S.E.2d 840 (1987); Hamrick v. Bonner, 182 Ga. App. 76, 354 S.E.2d 687 (1987); Hart v. Fortson, 263 Ga. 389, 435 S.E.2d 45 (1993).

Applicability

1. In General

Appeal only where probate court's exclusive jurisdiction in whole case involved. — Appeal must be from decision of court of ordinary (now probate court) in exercise of exclusive jurisdiction in whole case made by application to probate. A ruling striking some but not all grounds of caveat to application to probate a will is not such a decision. Hartley v. Holwell, 202 Ga. 724, 44 S.E.2d 896 (1947).

Motion to amend judgment does not extend time to file. — An appeal from a motion to amend judgment of a probate court is not a final judgment and thus, is not an appealable decision within the meaning of subsection (a) of this section. Nor will

such a motion extend the date for filing a notice of appeal under the plain and literal language of § 5-3-20(a). Jabaley v. Jabaley, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Appeal under section allowed from appointment of permanent administrator. Deckle v. McLeod, 144 Ga. 289, 86 S.E. 1082 (1915).

Decision regarding compensation and discharge of temporary administrator is appealable under section. Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897).

Decision concerning application of administrator or guardian for discharge is appealable under this section. Maloy v. Maloy, 131 Ga. 579, 62 S.E. 991 (1908).

Dismissal of petition to remove administrator is appealable under this section. Wells v. Chambers, 28 Ga. App. 429, 111 S.E. 677 (1922).

Order denying petition by incompetent World War I veteran for removal of guardian. — Appeal lies from order denying petition by incompetent World War I veteran for removal of guardian and appointment of new guardian, for accounting and recovery of moneys due, and for other relief, on account of alleged returns by guardian without proper vouchers and a devastavit as to certain amounts. Dillon v. Sills, 54 Ga. App. 299, 187 S.E. 725 (1936).

Appeal allowed from revocation of letters of guardianship, though no issue of fact is involved. Teasley v. Campbell, 133 Ga. 545, 66 S.E. 273 (1909); Teasley v. Vickery, 133 Ga. 721, 66 S.E. 918 (1910); Wash v. Wash, 145 Ga. 405, 89 S.E. 364 (1916).

Where guardian is removed and his letters revoked, upon rule issued by ordinary (now judge of probate court) under §§ 29-4-14, 29-4-15, and 29-2-45, after hearing on the answer to such rule filed by guardian, the person may appeal to superior court. Bruce v. Dunn, 52 Ga. App. 758, 184 S.E. 361 (1936).

Decision refusing ex parte application made by executor or administrator is appealable under this section. Findlay v. Whitmire, 15 Ga. 334 (1854).

Judgment for money against administrator or guardian under citation for settlement is appealable under this section. Hobbs v. Cody, 45 Ga. 478 (1872).

Probate court's refusal to grant letters pendente lite is appealable under this sec-

Applicability (Cont'd) **1. In General (Cont'd)**

tion. *Barksdale v. Cobb*, 16 Ga. 13 (1854); *Gresham v. Pyron*, 17 Ga. 263 (1855).

Judgment, final insofar as it adjudges that certain disbursements made by administrator were unauthorized, is appealable under section even though it reserves to ordinary (now judge of probate court) the right at a later date to order distribution of estate according to terms of will. *Cubine v. Cubine*, 69 Ga. App. 566, 26 S.E.2d 462 (1943).

Appeal lies from judgment on caveat or objections to return of appraisers setting apart year's support, which right likewise is expressly recognized by § 53-5-8 relating to return of appraisers. *Tilley v. King*, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

Prerequisite to appeal from judgment setting apart homestead. — Judgment of ordinary (now judge of probate court) setting apart a homestead can only be reviewed by certiorari unless objected to as provided for under § 44-13-13. *Fontano v. Mozley & Co.*, 121 Ga. 46, 48 S.E. 707 (1904).

Appeal from dismissal of application for homestead. — No appeal lies from decision of ordinary (now judge of probate court) sustaining demurrer (now motion to dismiss) to application for homestead. In such case, certiorari is exclusive remedy for reviewing judgment. *Cunningham v. United States Sav. & Loan Co.*, 109 Ga. 616, 34 S.E. 1024 (1900).

Habeas corpus proceedings. — Section does not confer right of appeal from decision of ordinary (now judge of probate court) in habeas corpus proceeding. *Burden v. Barron*, 154 Ga. 630, 115 S.E. 1 (1922) (decided under former Code 1910, § 5011).

No direct appeal from interlocutory order. — An appeal from probate court to superior court is for the purpose of conducting a de novo investigation in the superior court, and not for the purpose of correcting errors of law committed in the probate court. Thus, there can be no direct appeal to the superior court from an interlocutory ruling in the probate court. *Driver v. State*, 198 Ga. App. 643, 402 S.E.2d 524, cert. denied, 198 Ga. App. 897, 402 S.E.2d 524 (1991).

Decisions regarding annual returns of administrators are not covered by this section.

Adams v. Beall, 60 Ga. 325 (1878) (decided under former Code 1873, § 3624).

Appeal by mental health facility from adverse commitment decision. — A mental health facility did not have the right to appeal from an adverse involuntary commitment decision and the facility did not have statutory authority, nor would it have been constitutional to detain the patient pending appeal of a probate court order of discharge. *Georgia Mental Health Inst. v. Brady*, 263 Ga. 591, 436 S.E.2d 219 (1993).

Appeal from decisions of commissioners appointed by ordinary (now judge of probate court) not authorized. *Pope v. Hays*, 30 Ga. 539 (1860).

No appeal lies from preliminary ruling in main case. — Appeal to superior court from preliminary ruling and before court of ordinary (now probate court) rendered judgment in the main case, would improperly usurp jurisdiction of court of ordinary, in violation of Ga. Const. 1976, Art. VI, Sec. VI, Para. I (see Ga. Const. 1983, Art. VI, Sec. I, Para. I) and § 53-3-1 depriving that court of jurisdiction to decide main question. *Hartley v. Holwell*, 202 Ga. 724, 44 S.E.2d 896 (1947).

2. Distinction Between Appeal and Certiorari

Certiorari is proper but not exclusive remedy to correct certain errors in decisions of courts of ordinary (now probate courts). *Stephens v. Bell*, 41 Ga. App. 353, 153 S.E. 99 (1930).

Election of remedy. — Where either appeal under this section, or certiorari under § 5-4-2 is appropriate, movant may elect which one he will pursue. *Pierce v. Felts*, 146 Ga. 809, 92 S.E. 541 (1917).

Distinction between statutory appeal on merits and appeal by writ of error. — Statutory appeal providing for another trial in appellate court on merits of the case is altogether different from writ of error on appeal for correction of errors in trial eventuating in judgment from which appeal is taken. In latter proceeding the inquiry is into correctness of judgment upon pleading and evidence before the trial court. Appellate court affirms or reverses in whole or in part the judgment on review and certifies result to trial court, where final judgment is entered. That procedure has nothing in

common with that of a statutory appeal. The statutory appeal allows litigants in certain cases the right to another trial in superior court upon compliance with certain requisites. Trial in superior court is had without reference to evidence introduced in former trial, and is a *de novo* investigation. *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934).

Jurisdiction

Appeal imparts same jurisdiction as was possessed by probate court. — Appeal under section brings whole case up for new hearing but with same jurisdiction as was possessed by court of ordinary (now probate court). *Knowles v. Knowles*, 125 Ga. App. 642, 188 S.E.2d 800 (1972).

Superior court on trial of appeal from court of ordinary (now probate court) has no broader powers than court of ordinary itself had. *Goodman v. Little*, 213 Ga. 178, 97 S.E.2d 567 (1957).

Effect of Appeal

Whole case brought up. — By § 5-3-29, appeal under this section brings up whole case for new hearing. *Moody v. Moody*, 29 Ga. 519 (1859).

Case on appeal from the court of ordinary (now probate court) brings the whole case up for a new hearing. *Goodman v. Little*, 213 Ga. 178, 97 S.E.2d 567 (1957).

De novo investigation. — Appeal under section places matter in superior court for

de novo investigation under § 5-3-29. *Knowles v. Knowles*, 125 Ga. App. 642, 188 S.E.2d 800 (1972).

When such appeal is made, it is a *de novo* investigation for subject matter appealed. *Anderson v. Smith*, 76 Ga. App. 171, 45 S.E.2d 282 (1947), overruled on other grounds, *Sorrells v. Sorrells*, 247 Ga. 9, 274 S.E.2d 314 (1981).

Trial in superior court of statutory appeals is had without reference to evidence introduced in former trial, and is a *de novo* investigation; when a case is on appeal, any amendment, whether in matter of form or substance, may be made which could have been made while case was in primary court. *Wofford v. Vandiver*, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

An appeal of an application for a year's support award by a probate court is a *de novo* proceeding in the superior court, and as such, the appeal is subject to the established procedures for civil actions, thus entitling a party to invoke summary judgment. *Bright v. Knecht*, 182 Ga. App. 820, 357 S.E.2d 159 (1987).

Case appealed under section must be tried anew. It is not the province of superior court on such appeal to review and affirm or reverse rulings of ordinary (now judge of probate court), but to try issue anew and pass original judgments on questions involved as if there had been no previous trial. *Knowles v. Knowles*, 125 Ga. App. 642, 188 S.E.2d 800 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 192-194.

C.J.S. — 4 C.J.S., Appeal and Error, § 141.

ALR. — Change of law after decision of lower court as affecting decision on appeal or error, 111 ALR 1317; 151 ALR 987.

Questions or legal theories affecting trust estates as subject to consideration on appeal though not raised below, 11 ALR2d 317.

Appealability of order pertaining to pre-trial examination, discovery, interrogatories,

production of books and papers, or the like, 37 ALR2d 586.

Appealability of order, of court possessing probate jurisdiction, allowing or denying tardy presentation of claim to personal representative, 66 ALR2d 659.

Appealability of order entered in connection with pretrial conference, 95 ALR2d 1361.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

5-3-3. Persons by whom appeal may be entered generally; attorney's authority to appeal to be in writing; dismissal for failure to file same; ratification of unauthorized appeal.

An appeal may be entered by the plaintiff or defendant in person, or by his attorney at law or in fact and, if by the latter, he must be authorized in writing, which authority shall be filed in the court in which the case is pending at the time the appeal is entered; but if it is shown to the court that the authority exists, the court may allow a reasonable time to file the same. Upon failure to so file, the appeal shall be dismissed and execution shall issue without further order. If the authority is not filed within the time allowed, a ratification of an unauthorized appeal, if made in writing and filed in the clerk's office before the next term of the court, shall render the appeal valid. (Orig. Code 1863, § 3535; Code 1868, § 3558; Code 1873, § 3615; Code 1882, § 3615; Civil Code 1895, § 4457; Civil Code 1910, § 5002; Code 1933, § 6-104.)

JUDICIAL DECISIONS

Appeals without written authority. — This section and § 15-19-5 permit attorneys at law to enter appeals without written authority. *Friar v. Curry, Arrington & Co.*, 119 Ga. 908, 47 S.E. 206 (1904); *Nathan v. Lamb*, 18 Ga. App. 39, 88 S.E. 794 (1916).

Assessor's award in condemnation proceedings. — Attorney at law for municipality may file appeal to assessor's award in condemnation proceedings. *Potts v. City of Atlanta*, 140 Ga. 431, 79 S.E. 110 (1913).

Attorneys in fact cannot enter appeals absent writing sufficiently establishing authority to do so. *Lovelady v. Franklin Davis Nursery Co.*, 113 Ga. 324, 38 S.E. 748 (1901); *Lovejoy v. Franklin Davis Nursery Co.*, 115 Ga. 714, 42 S.E. 151 (1902).

Agent created by parol cannot enter appeal under section. *Cook v. Buchanan*, 86 Ga. 760, 13 S.E. 83 (1891).

Where written authority has been lost, appeal may be ratified. *Booten v. Bank of Empire State*, 67 Ga. 358 (1881).

Agent cannot show authority by ex parte affidavit. *Bank of Empire State v. Booten*, 52 Ga. 653 (1874).

Receiver cannot enter appeal unless he is party to proceedings. *Dupree v. Drake*, 94 Ga. 456, 19 S.E. 242 (1894).

Judgments in criminal cases favorable to defendant. — State cannot appeal judgment in criminal case favorable to defendant unless authorized by statute. *State v. B'Gos*, 175 Ga. 627, 165 S.E. 566 (1932) (decided before enactment of Ch. 7 of this title).

Cited in *McCoy v. Sasnett*, 77 Ga. App. 819, 49 S.E.2d 913 (1948); *State Hwy. Dep't v. Sumner*, 102 Ga. App. 1, 115 S.E.2d 787 (1960); *State Hwy. Dep't v. Hester*, 112 Ga. App. 51, 143 S.E.2d 658 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 172-177, 195, 290.

C.J.S. — 4 C.J.S., Appeal and Error, § 171.

ALR. — Right of trustee of express trust to appeal from order or decree not affecting his own personal interest, 6 ALR2d 147.

Attorney's right to institute or maintain appeal where client refuses to do so, 91 ALR2d 618.

5-3-4. Appeal by one of several plaintiffs or defendants — Authorization and procedure generally.

When there is more than one party plaintiff or defendant, and one or more of the parties plaintiff or defendant desire to appeal, and the others refuse or fail to appeal, the party plaintiff or defendant desiring to appeal may enter an appeal in the manner provided by law. (Laws 1839, Cobb's 1851 Digest, p. 500; Code 1863, § 3539; Code 1868, § 3562; Code 1873, § 3619; Code 1882, § 3619; Civil Code 1895, § 4461; Civil Code 1910, § 5006; Code 1933, § 6-110; Ga. L. 1995, p. 10, § 5.)

The 1995 amendment, effective February 21, 1995, part of an Act to correct errors and

omissions in the Code, substituted "desire to appeal" for "desires to appeal".

JUDICIAL DECISIONS

Parties to appeal. — Although only one of the coparties appeals, all of the coparties who have the same interests and rights are also a party to the appeal. *Hunt v. Henderson*, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Right of all parties to prosecute or defend. — All parties who are brought up on appeal, whether they have filed an appeal or not have the right to appear and prosecute or defend, whichever the case may be. *Hunt v. Henderson*, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Section inapplicable to certiorari cases, but applies to appeals only. *Winn v. Ingram*, 3 Ga. App. 628, 60 S.E. 328 (1908).

Suits against several defendants jointly. — Section inapplicable where several defendants jointly sued are discharged and remaining defendant held liable. It is other-

wise if judgment below was rendered against all defendants. *Patterson v. Barrow*, 99 Ga. 166, 25 S.E. 398 (1896).

Defendant cannot enter appeal from only part of judgment. *Bryson v. Scott*, 111 Ga. 196, 36 S.E. 619 (1900).

Where nonappealing defendant dies between first and second trial. — Where one of three defendants enters appeal under section, and one of other two dies, between first and second trial, he was a party to appeal, so far as to require his legal representative to be made a party to cause before it can proceed. *Stell v. Glass*, 1 Ga. 475 (1846).

Cited in *Powell v. Perry*, 63 Ga. 417 (1879); *Metzer v. Steed*, 132 Ga. 822, 65 S.E. 117 (1909); *Marks v. Steinberg*, 55 Ga. App. 561, 190 S.E. 808 (1937); *Colley v. Dillon*, 158 Ga. App. 416, 280 S.E.2d 425 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, § 277. 5 Am. Jur. 2d, Appeal and Error, §§ 951, 952.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 29, 193, 194, 585.

ALR. — May new trial or reversal for error as to measure of damages against one or

more of the parties be restricted to those parties, 32 ALR 255.

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal has passed, 32 ALR3d 1290.

5-3-5. Appeal by one of several plaintiffs or defendants — Effect of judgment on appeal generally; recovery of damages awarded upon appeal.

Upon the appeal of either party plaintiff or defendant, as provided in Code Section 5-3-4, the whole record shall be taken up and all shall be bound by the final judgment; but, in case damages are awarded upon such appeal, the damages shall only be recovered against the party appealing and his security, if any, and not against the party failing or refusing to appeal. (Laws 1839, Cobb's 1851 Digest, p. 500; Code 1863, § 3540; Code 1868, § 3563; Code 1873, § 3620; Code 1882, § 3620; Civil Code 1895, § 4462; Civil Code 1910, § 5007; Code 1933, § 6-111.)

JUDICIAL DECISIONS

Whole record brought up. — By this section and § 5-3-29, appeal brings up whole record, and a party not appealing can make amendments to a plea or answer already entered. *Murray v. Marshall*, 106 Ga. 522, 32 S.E. 634 (1899).

Appeal under section carries up whole record and judgment binds both appealing and nonappealing parties. *Murray v. Marshall*, 106 Ga. 522, 32 S.E. 634 (1899); *Bryson v. Scott*, 111 Ga. 196, 36 S.E. 619 (1900).

Two parties may file appeal jointly. — Where either party, without other joining, can appeal, and all be bound by final judgment, appeal will not be null and void simply because two of the parties filed appeal jointly. *Marks v. Steinberg*, 55 Ga. App. 561, 190 S.E. 808 (1937).

Section applies to appeals from decrees. *Smith v. Cooper*, 21 Ga. 359 (1857).

Entry of appeal prevents issuance of exe-

cution against other party. *Lewis v. Armstrong*, 69 Ga. 752 (1882).

Appeal by maker of note from joint judgment of county against him and indorsers prevents execution against indorsers. *Turnell v. Carter*, 5 Ga. App. 847, 64 S.E. 114 (1909).

Right of all parties to prosecute or defend. — All parties who are brought up on appeal, whether they have filed an appeal or not have the right to appear and prosecute or defend, whichever the case may be. *Hunt v. Henderson*, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Cited in *Powell v. Perry*, 63 Ga. 447 (1879); *Lewis & Co. v. Chisolm*, 68 Ga. 40 (1881); *Wheeler v. Layman Foundation*, 188 Ga. 267, 3 S.E.2d 645 (1939); *Hardwick v. Georgia Power Co.*, 100 Ga. App. 38, 110 S.E.2d 24 (1959); *Colley v. Dillon*, 158 Ga. App. 416, 280 S.E.2d 425 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, §§ 951, 952, 959.

C.J.S. — 4 C.J.S., Appeal and Error, § 216.

ALR. — May new trial or reversal for error as to measure of damages against one or more of the parties be restricted to those parties, 32 ALR 255.

Power of legislature to require appellate court to review evidence, 33 ALR 10.

Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case as against codefendant, 114 ALR 759.

Grant of new trial, or reversal of judgment on appeal as to one joint tort-feasor, as requiring new trial or reversal as to other tort-feasor, 143 ALR 7.

5-3-6. Appeal by one of several plaintiffs or defendants — Liability and recourse of surety on judgment on appeal.

The security, if any, of the party appealing shall be bound for the judgment on the appeal; and, in case the security is compelled to pay off the debt or damages for which judgment is entered in the case, he shall have recourse only against the party for whom he became security. (Laws 1823, Cobb's 1851 Digest, p. 498; Laws 1839, Cobb's 1851 Digest, p. 500; Code 1863, § 3541; Code 1868, § 3564; Code 1873, § 3621; Code 1882, § 3621; Civil Code 1895, § 4463; Civil Code 1910, § 5008; Code 1933, § 6-112.)

Law reviews. — For survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982).

JUDICIAL DECISIONS

First part of section provides for liability where principal appeals, whether or not surety appeals. *Beall v. Cochran*, 18 Ga. 38 (1855); *Barnett v. Travis*, 96 Ga. 760, 22 S.E. 314 (1895); *National Sur. Co. v. White*, 21 Ga. App. 471, 94 S.E. 589 (1917).

Second clause of section grants right of subrogation against principal. *National Surety Co. v. White*, 21 Ga. App. 471, 94 S.E. 589 (1917).

Charging estate of security. — Plaintiff, by scire facias, may charge estate of security on appeal with amount of final judgment rendered against original party. *Bank of Charleston v. Moore*, 6 Ga. 416 (1849).

Plaintiff may charge estate of security with amount of judgment by entry of judgment

nunc pro tunc. *Mayo v. Kersey*, 24 Ga. 167 (1858).

Surety not subject for breach of bond where trial cannot be had as to appellant. — Condemnation money for which surety on appeal is liable under section is that which is recovered in case on appeal trial. If, by reason of injunction, death or other cause, no trial of case is or can be had as to appellant, the surety is not subject for a breach of bond. *Planters' & Miners' Bank v. Hudgins*, 84 Ga. 108, 10 S.E. 501 (1889).

Cited in *Satzky v. King*, 115 Ga. 948, 42 S.E. 233 (1902); *Bennett v. Farkas*, 126 Ga. 228, 54 S.E. 942 (1906); *Touchton v. Stewart*, 222 Ga. 455, 150 S.E.2d 643 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 340-344.

C.J.S. — 4A C.J.S., Appeal and Error, § 352.

ALR. — Failure of sureties on appeal bond to justify after exception to their sufficiency and consequent dismissal of appeal, as releasing them from liability, 96 ALR 1371.

Liability on supersedeas bond which was

legally insufficient to effect stay, where enforcement of judgment was in fact suspended, 120 ALR 1062.

Condition of bond on appeal not in terms covering payment of money judgment, as having that effect by implication or construction, 124 ALR 501.

Attorneys' fees paid by appellee in resisting unsuccessful appellate review as damages recoverable on appeal bond, 37 ALR2d 525.

5-3-7. Appeal suspends judgment; effect of dismissal or withdrawal of appeal.

An appeal shall suspend but not vacate a judgment and, if dismissed or withdrawn, the rights of all the parties shall be the same as if no appeal had been entered. (Orig. Code 1863, § 3549; Code 1868, § 3572; Code 1873, § 3628; Code 1882, § 3628; Civil Code 1895, § 4470; Civil Code 1910, § 5015; Code 1933, § 6-502.)

Cross references. — For similar provisions regarding suspension of judgment by appeal, see § 9-12-19.

JUDICIAL DECISIONS

Justice's court judgment remains operative, but incapable of enforcement pending appeal. *Haygood v. King*, 161 Ga. 732, 132 S.E. 62 (1926); *Tilley v. King*, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

Effect of section is to preserve all incidents of judgment except right to enforce it by sale of defendant's property pending appeal. *Watkins v. Angier*, 99 Ga. 519, 27 S.E. 718 (1896).

Dismissal of appeal by superior court for want of jurisdiction renders county court's judgment final. *Johnson v. Ford*, 92 Ga. 751, 19 S.E. 712 (1894).

Effect of dismissal of appeal to superior court from judgment of court of ordinary (now probate court) admitting will to probate was to make effective judgment of court of ordinary. *Hooks v. Hooks*, 197 Ga. 482, 29 S.E.2d 599 (1944).

Appellant cannot, without adverse party's consent, certify case back to inferior court. — In appeal from inferior court, or assessors in condemnation proceeding, to superior court, the law contemplates that if judgment is obtained in superior court the prevailing party is entitled to superior court execution and aid of all processes of superior court to enforce its judgment. A dismissal of the entire case or proceedings with consent of court might be permissible under some circumstances, for this would be a final termination of the entire case or proceedings, but appellant cannot, at will and without consent of adverse party, certify case back to inferior court, or to assessors, and relegate adverse party to processes of inferior court. Such

would be the effect of allowing appellant to withdraw his appeal without consent of adverse party contrary to provisions of § 5-3-8. *State Hwy. Bd. v. Long*, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

Dismissal by appealing party. — The appealing party cannot dismiss the appeal to the prejudice of his coparties, as their rights on appeal are equal to those of the party making the appeal. *Hunt v. Henderson*, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Distinction between dismissing case on appeal and dismissing appeal. — Difference must be noted between dismissing case on appeal and dismissing an appeal. The first dismissal lets out whole case while second is an affirmance of judgment below and rights of all parties are same as if no appeal had been entered. *Fagan v. McTier*, 81 Ga. 73, 6 S.E. 177 (1888); *State Hwy. Bd. v. Long*, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

While appeal only suspends and does not vacate judgment allowing probate in solemn form, so that judgment may again become effective in event of dismissal of appeal, a dismissal of the case vitiates entire proceeding, leaving parties in same status as if no action was ever commenced to probate in solemn form. *Hodges v. Libbey*, 120 Ga. App. 246, 170 S.E.2d 37 (1969).

Time period that lien of judgment is binding. — Where on appeal from judgment in justice's court appellee is successful, lien of judgment will be taken as binding from date of its original rendition, and entitled to superiority over subsequently rendered judgment, notwithstanding provisions of § 9-12-88. *Tilley v. King*, 193 Ga. 602, 19

S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

Where plaintiff, appellee, obtains judgment on appeal, such judgment, as to priority, is to be treated as being of date when judgment appealed from was entered, and accordingly it takes precedence over another judgment rendered by superior court, older than judgment on appeal, but younger than original judgment entered in justice's court. *Watkins v. Angier*, 99 Ga. 519, 27 S.E. 718 (1896).

Property bought by defendant before entry of judgment on justice's docket is bound by subsequent judgment in superior court. *Dodd & Co. v. Glover*, 102 Ga. 82, 29 S.E. 158 (1897).

Statute of limitations does not run while appeal is pending. — Statute of limitations

does not run in favor of plaintiff in error as to judgment in justice's court, and execution cannot be issued upon such judgment pending appeal in superior court. *Twitty v. Bower*, 84 Ga. 751, 11 S.E. 354 (1890).

Cited in *Robinson v. Medlock*, 59 Ga. 598 (1877); *East Tennessee V. & Ga. R.R. v. Miles*, 72 Ga. 252 (1884); *Raspberry v. Harville*, 90 Ga. 530, 16 S.E. 299 (1892); *Reagan v. Powell*, 125 Ga. 89, 53 S.E. 580 (1906); *Jones v. Cannady*, 78 Ga. App. 453, 51 S.E.2d 551 (1949); *Garrison v. McGuire*, 114 Ga. App. 665, 152 S.E.2d 624 (1966); *Anderson v. Burnham*, 12 Bankr. 286 (Bankr. N.D. Ga. 1981); *Nelson v. Smothers*, 168 Ga. App. 120, 308 S.E.2d 239 (1983); *Williamson v. Lucas*, 78 Bankr. 372 (Bankr. M.D. Ga. 1987); *Georgia Mental Health Inst. v. Brady*, 263 Ga. 591, 436 S.E.2d 219 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 352-396.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 409, 432.

ALR. — First decision of intermediate court as law of the case on appeal to court of last resort from subsequent decision, 41 ALR 1078; 118 ALR 1286.

Judgment in tort action as subject of assignment, attachment, or garnishment pending appeal, 121 ALR 420.

Running of limitations against proceeding to renew or revive judgment as affected by appeal or right of appeal from judgment, or by motion or right to move for new trial, 123 ALR 565.

Liability of insurer under policy indemnifying against liability or loss as affected by

pendency of appeal or motion for new trial from judgment against insured or by the fact that time for appeal or motion for new trial has not expired, 125 ALR 755.

Decree on bill of review reversing prior decree as affecting purchaser or mortgagee of real property in the interval between the original decree and the filing of the bill of review, 150 ALR 676.

Defeated party's payment or satisfaction of, or other compliance with, civil judgment as barring his right to appeal, 39 ALR2d 153.

Conviction from which appeal is pending as bar to another prosecution for same offense, 61 ALR2d 1224.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

5-3-8. Requirement of consent to withdrawal of appeal.

After an appeal has been entered, no person shall be allowed to withdraw the appeal without the consent of the adverse party. (Laws 1799, Cobb's 1851 Digest, p. 495; Code 1863, § 3550; Code 1868, § 3573; Code 1873, § 3629; Code 1882, § 3629; Civil Code 1895, § 4471; Civil Code 1910, § 5016; Code 1933, § 6-503.)

JUDICIAL DECISIONS

Sole provision for dismissing appeal. — This section, except for defects in proceedings, is only provision for dismissing appeal.

Rousch v. Green, 2 Ga. App. 112, 58 S.E. 313 (1907).

Only provision for dismissal of appeal to

superior court, except for defects in appeal proceedings, is found in this section, which provides that no person shall be allowed to withdraw an appeal after it shall be entered but by consent of adverse party. *Rabun v. Planters Cotton Oil Co.*, 68 Ga. App. 37, 21 S.E.2d 922 (1942).

Dismissal of appeal without adverse party's consent. — Under general law, an appeal is a de novo investigation, and it is error for court to dismiss appeal where there is no defect in appeal proceedings, and where adverse party does not consent for appeal to be withdrawn or dismissed. *Rose City Foods, Inc. v. Usry*, 86 Ga. App. 307, 71 S.E.2d 649 (1952).

Certification of case back to inferior court. — In appeal from inferior court, or assessors in condemnation proceeding, to superior court, the law contemplates that if judgment is obtained in superior court the prevailing party is entitled to a superior court execution and aid of all processes of superior court to enforce its judgment. A dismissal of the entire case or proceedings with consent of court might be permissible under some circumstances, for this would be a final termination of the entire case or proceedings, but appellant cannot, at will and without consent of adverse party, certify case back to inferior court, or to assessors,

and relegate adverse party to processes of inferior court. Such would be the effect of allowing appellant to withdraw his appeal without consent of adverse party contrary to provisions of this section. *State Hwy. Bd. v. Long*, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

Attempted withdrawal of appeal by appellant, in vacation. — Attempt by appellant to withdraw, in vacation, appeal from judgment of court of ordinary (now probate court) establishing a will, by entry on docket by clerk of court, is a nullity. *Raspberry v. Harville*, 90 Ga. 530, 16 S.E. 299 (1892).

Applicability to other provisions. — Provisions of section are applicable to appeals in condemnation proceedings instituted under Ch. 2, T. 22 governing condemnation by state and national government and all others exercising right of eminent domain. *State Hwy. Dep't v. Blalock*, 98 Ga. App. 630, 106 S.E.2d 552 (1958).

Cited in *Tommey & Stewart v. Finney*, 45 Ga. 155 (1872); *Robison v. Medlock*, 59 Ga. 598 (1877); *Ellis v. O'Neal*, 175 Ga. 652, 165 S.E. 751 (1932); *Bethea County v. Dixon*, 72 Ga. App. 384, 33 S.E.2d 723 (1945); *State Hwy. Dep't v. Thomas*, 122 Ga. App. 252, 176 S.E.2d 635 (1970); *Pilgrim v. Brookfield West, Inc.*, 136 Ga. App. 619, 222 S.E.2d 137 (1975).

RESEARCH REFERENCES

ALR. — First decision of intermediate court as law of the case on appeal to court of last resort from subsequent decision, 41 ALR 1078; 118 ALR 1286.

Public interest as ground for refusal to dismiss an appeal, where question has become moot, or dismissal is sought by one or both parties, 132 ALR 1185.

ARTICLE 2

PROCEDURE

5-3-20. Time for filing appeals.

(a) Appeals to the superior court shall be filed within 30 days of the date the judgment, order, or decision complained of was entered.

(b) The date of entry of an order, judgment, or other decision shall be the date upon which it was filed in the court, agency, or other tribunal rendering same, duly signed by the judge or other official thereof.

(c) This Code section shall apply to all appeals to the superior court, any other law to the contrary notwithstanding. (Orig. Code 1863, § 3533; Code 1868, § 3556; Code 1873, § 3613; Code 1882, § 3613; Civil Code 1895, § 4455; Civil Code 1910, § 5000; Code 1933, § 6-102; Ga. L. 1972, p. 738, § 1.)

History of section. — This section is derived from the decision in *State v. Dean*, 9 Ga. 405 (1851).

JUDICIAL DECISIONS

Section is not a statute of limitation but is jurisdictional. — The requirement of this Code section that appeals to superior court must be filed “within 30 days of the date the judgment, order, or decision complained of was entered” is not a statute of limitation but is jurisdictional in nature. *Rowell v. Parker*, 192 Ga. App. 215, 384 S.E.2d 396 (1989).

Section applied liberally in sustaining appeals. — A very liberal rule has uniformly been recognized in sustaining appeals when party appealing has shown bona fide intention to do so within the four days (now 30 days) allowed by section. *Bank of Empire State v. Booton*, 52 Ga. 653 (1874).

Appeal cannot, except by consent or parties, be entered until after judgment in court of ordinary (now probate court). *Wright v. Clark*, 139 Ga. 34, 76 S.E. 565 (1912); *Bates v. Weaver*, 145 Ga. 241, 88 S.E. 986 (1916).

Motion to amend judgment does not extend time to file. — An appeal from a motion to amend judgment of a probate court is not a final judgment and thus, is not an appealable decision within the meaning of § 5-3-2(a). Nor will such a motion extend the date for filing a notice of appeal under the plain and literal language of subsection (a) of this section. *Jabaley v. Jabaley*, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Jurisdiction of court in county without more than 100,000 persons. — Probate court of county that did not have a population of more than 100,000 persons according to either the 1980 or 1990 decennial census lacked authority to entertain a motion for new trial, and any such motion therefore being without legal force and effect before the county probate court, would not serve to extend the time for filing a notice of appeal under either § 5-6-38(a) or this section. *Jabaley v. Jabaley*, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Appeal from magistrate court. — Magistrate courts are not courts of record with the power to grant new trials; thus, a motion for a new trial in the magistrate court did not toll the time for filing an appeal to state or superior court. *Bowen v. Ball*, 215 Ga. App. 640, 451 S.E.2d 502 (1994).

Newly discovered evidence where party negligently failed to enter timely appeal. — When party did not enter appeal within time prescribed and has otherwise been guilty of negligence, a new trial will not be granted on account of newly discovered evidence. *Miller v. Mitchell, Reid & Co.*, 38 Ga. 312 (1868).

Section does not extend time for filing notice of appeal specified in § 22-2-112. *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Denial of request for rezoning. — The signing of the initial document reducing to writing county commission's decision denying a request to rezone a piece of property commenced the running of the clock under this section. Where the chairman of the board of commissioners executed the written minutes of the meeting in which the request was denied on March 25, 1986, the 30-day period for the filing of an appeal began to run on that day, although official notice of the denial was not received in the mail until May 22, 1986. *Chadwick v. Gwinnett County*, 257 Ga. 59, 354 S.E.2d 420 (1987).

Effect of filing in wrong court. — Where a notice of appeal from a probate court decision is filed in a timely fashion, the superior court is vested with discretion in determining whether to dismiss the appeal. If the superior court finds that the filing of the notice of appeal in superior court has caused an unreasonable as well as inexcusable delay in the transmission of the record from the

probate court, the appeal should be dismissed. Otherwise, the superior court is authorized to retain the appeal. In that event, the superior court has ample authority under § 5-3-27 to enter an order directing that the probate court transmit the record to the superior court so that the appeal can be decided. *Mack v. Demming*, 248 Ga. 117, 281 S.E.2d 591 (1981).

Cited in *Ansley v. Barlow*, 103 Ga. 107, 29 S.E. 596 (1897); *Wood v. McCrary*, 107 Ga. 345, 33 S.E. 395 (1899); *Knox v. Crump*, 15 Ga. App. 697, 84 S.E. 169 (1915); *Holston Box & Lumber Co. v. Holcomb*, 30 Ga. App. 651, 118 S.E. 577 (1923); *Hughes v. State Bd. of Medical Exmrs.*, 162 Ga. 246, 134 S.E. 42 (1926); *Gray v. Gunby*, 206 Ga. 63, 55 S.E.2d 588 (1949); *Weatherford v. Weatherford*, 114 Ga. App. 223, 150 S.E.2d 713 (1966);

Burson v. Foster, 123 Ga. App. 168, 179 S.E.2d 678 (1971); *Pope v. Wolfe*, 128 Ga. App. 226, 196 S.E.2d 412 (1973); *Irby v. Christian*, 130 Ga. App. 375, 203 S.E.2d 284 (1973); *State Bd. of Equalization v. Pineland Tel. Coop.*, 135 Ga. App. 796, 219 S.E.2d 1 (1975); *King v. King*, 137 Ga. App. 251, 223 S.E.2d 752 (1976); *City of Atlanta v. International Soc’y for Krishna Consciousness of Atlanta, Inc.*, 240 Ga. 96, 239 S.E.2d 515 (1977); *Hawn v. Chastain*, 246 Ga. 723, 273 S.E.2d 135 (1980); *Village Ctrs., Inc. v. DeKalb County*, 248 Ga. 177, 281 S.E.2d 522 (1981); *Chambers v. City of Atlanta Bd. of Zoning Adjustment*, 255 Ga. 538, 340 S.E.2d 922 (1986); *Copeland v. White*, 178 Ga. App. 644, 344 S.E.2d 436 (1986); *Hunt v. Henderson*, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 309-315. 62B Am. Jur. 2d, Process, §§ 234, 236.

ALR. — Lower court’s consideration, on the merits, of unseasonable application for new trial, rehearing, or other re-examination, as affecting time in which to apply for appellate review, 148 ALR 795.

Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted, 10 ALR2d 1075.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 ALR2d 482.

Retroactive effect on appeal from judgment previously entered of statute shortening time allowed for appellate review, 81 ALR2d 417.

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal has passed, 32 ALR3d 1290.

Defendant’s appeal from plea conviction as affected by prosecutor’s failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 ALR3d 1262.

5-3-21. Notice of appeal; form; service.

(a) An appeal to the superior court may be taken by filing a notice of appeal with the court, agency, or other tribunal appealed from. No particular form shall be necessary for the notice of appeal, but the following is suggested:

(NAME OF INFERIOR JUDICATORY)

STATE OF GEORGIA

_____)	
)	
v.)	(Case number
)	designation)
)	
_____)	

APPEAL TO SUPERIOR COURT

Notice is hereby given that _____, appellant herein, and _____, above-named, hereby appeals to the Superior (plaintiff, defendant, etc.) Court of _____ County from the judgment (or order, decision, etc.) entered herein on _____, 19____.

Dated: _____, 19____.

Attorney For
Appellant

Address

(b) A copy of the notice of appeal shall be served on all parties in the same manner prescribed by Code Section 5-6-32. Failure to perfect service on any party shall not work dismissal, but the superior court shall grant continuances and enter such other orders as may be necessary to permit a just and expeditious determination of the appeal. (Orig. Code 1863, § 3534; Code 1868, § 3557; Ga. L. 1868, p. 131, § 2; Code 1873, § 3614; Code 1882, § 3614; Civil Code 1895, § 4456; Civil Code 1910, § 5001; Code 1933, § 6-103; Ga. L. 1972, p. 738, § 3.)

JUDICIAL DECISIONS

Authority for appeals. — This Code section does not constitute an enabling act that authorizes appeals from any court, agency, or tribunal, and any authority for appeals to superior court must be found in other Code sections. *Southern States Landfill, Inc. v. City of Atlanta Bd. of Zoning Adjustments*, 261 Ga. 759, 410 S.E.2d 721 (1991).

Notice is absolute jurisdictional requirement. — The proper and timely filing of a notice of appeal is an absolute requirement to confer jurisdiction upon the appellate court. *Cooper v. Gwinnett County Bd. of Educ.*, 157 Ga. App. 289, 277 S.E.2d 285 (1981); *Elbert County Bd. of Educ. v. Gurley*, 215 Ga. App. 205, 450 S.E.2d 258 (1994).

Supersedeas bond not notice of appeal. — While a notice of appeal serves as supersedeas unless a bond is ordered by the court, a supersedeas bond is not, of itself, a notice of appeal. A bond may be required for security as a prerequisite to bringing an

appeal but the bond does not, itself, commence the appeal. *Sharpe v. State*, 198 Ga. App. 381, 401 S.E.2d 586 (1991).

Effect of filing in wrong court. — Where a notice of appeal from a probate court decision is filed in a timely fashion, the superior court is vested with discretion in determining whether to dismiss the appeal. If the superior court finds that the filing of the notice of appeal in superior court has caused an unreasonable as well as inexcusable delay in the transmission of the record from the probate court, the appeal should be dismissed. Otherwise, the superior court is authorized to retain the appeal. In that event, the superior court has ample authority under § 5-3-27 to enter an order directing that the probate court transmit the record to the superior court so that the appeal can be decided. *Mack v. Demming*, 248 Ga. 117, 281 S.E.2d 591 (1981).

Appeal from decision rendered by local

school board. — Where no notice of appeal from a decision rendered by a local school board was filed with the State Board of Education but, instead, appellant filed an appeal directly in the superior court, proper appellate procedure was not followed. Therefore the superior court did not have jurisdiction to review the decision sought to be appealed. *Cooper v. Gwinnett County Bd.*

of Educ., 157 Ga. App. 289, 277 S.E.2d 285 (1981); *Elbert County Bd. of Educ. v. Gurley*, 215 Ga. App. 205, 450 S.E.2d 258 (1994).

Cited in *Lane v. Douglas*, 128 Ga. App. 231, 196 S.E.2d 368 (1973); *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975); *Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals*, 147 Ga. App. 128, 248 S.E.2d 196 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 316-322.

5-3-22. Payment of costs prerequisite to appeal; affidavit of indigence; dismissal for nonpayment following court order; supersedeas bond.

(a) No appeal shall be heard in the superior court until any costs which have accrued in the court, agency, or tribunal below have been paid unless the appellant files with the superior court or with the court, agency, or tribunal appealed from an affidavit stating that because of his indigence he is unable to pay the costs on appeal. In all cases, no appeal shall be dismissed in the superior court because of nonpayment of the costs below until the appellant has been directed by the court to do so and has failed to comply with the court's direction.

(b) Filing of the notice of appeal and payment of costs or filing of an affidavit as provided in subsection (a) of this Code section shall act as supersedeas, and it shall not be necessary that a supersedeas bond be filed; provided, however, that the superior court upon motion may at any time require that supersedeas bond with good security be given in such amount as the court may deem necessary unless the appellant files with the court an affidavit stating that because of his indigence he is unable to give bond. (Laws 1799, Cobb's 1851 Digest, p. 494; Code 1863, § 3536; Code 1868, § 3559; Code 1873, § 3616; Code 1882, § 3616; Civil Code 1895, § 4458; Civil Code 1910, § 5003; Code 1933, § 6-105; Ga. L. 1972, p. 738, § 4; Ga. L. 1995, p. 10, § 5.)

The 1995 amendment, effective February 21, 1995, part of an Act to correct errors and omissions in the Code, substituted "as pro-

vided in subsection (a) of this Code section" for "as above provided" near the beginning of subsection (b).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
COSTS
SUPERSEDEAS BOND

General Consideration

Purpose of payment. — Payments of costs in order to carry appeal is primarily intended to protect court officers. *Hilderbrand v. Housing Auth.*, 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Section 5-3-24 forms exception to this section. *Bryson v. Scott*, 111 Ga. 196, 36 S.E. 619 (1900).

Cited in *Planters' & Miners' Bank v. Hudgins*, 84 Ga. 108, 10 S.E. 501 (1889); *Lewis, Leonard & Co. v. Maulden*, 93 Ga. 758, 21 S.E. 147 (1894); *Chapple v. Tucker*, 110 Ga. 467, 35 S.E. 643 (1900); *Deiter v. Ragsdale*, 120 Ga. 417, 47 S.E. 942 (1904); *Hays v. Eubanks*, 125 Ga. 349, 54 S.E. 174 (1906); *Roberts v. Napier Bros.*, 126 Ga. 693, 55 S.E. 914 (1906); *Potts v. City of Atlanta*, 140 Ga. 431, 79 S.E. 110 (1913); *Whitson v. McNutt & Co.*, 26 Ga. App. 281, 105 S.E. 861 (1921); *Alvaton Mercantile Co. v. Caldwell*, 156 Ga. 317, 119 S.E. 25 (1923); *Goodwyn v. Veal*, 50 Ga. App. 657, 179 S.E. 126 (1935); *Trowbridge v. Dominy*, 92 Ga. App. 177, 88 S.E.2d 161 (1955); *Kendrix v. Superior Egg Co.*, 99 Ga. App. 575, 109 S.E.2d 59 (1959); *Smith v. Huckabee Properties, Inc.*, 111 Ga. App. 451, 142 S.E.2d 320 (1965); *Taylor v. Public Convalescent Serv.*, 245 Ga. 805, 267 S.E.2d 242 (1980); *Hawn v. Chastain*, 154 Ga. App. 609, 269 S.E.2d 50 (1980).

Costs

Costs within meaning of section include all costs accruing in case up to entry of appeal. *Shingler v. Furst*, 52 Ga. App. 39, 182 S.E. 72 (1935).

Failure of clerk to exact costs where he has recorded appeal will not operate as dismissal. *Crawford v. Cate*, 20 Ga. 69 (1856); *Lyner v. Jackson*, 20 Ga. 773 (1856); *Fain v. Fain*, 179 Ga. App. 285, 346 S.E.2d 96 (1986).

"Direct" means to give an order or command, not merely to advise or notify. Therefore, where appellant was notified by the probate court of the obligation to pay court costs, but was not directed to pay costs by the court, his appeal should not have been dismissed for nonpayment of costs. *Fain v. Fain*,

179 Ga. App. 285, 346 S.E.2d 96 (1986).

Successful appellant cannot secure a refund of costs. *Abrams v. Lang, Sons*, 60 Ga. 218 (1878).

Where appeal is withdrawn, judgment may be entered for costs but not amount due on execution. *Bryan v. Simpson*, 92 Ga. 307, 18 S.E. 547 (1893).

Supersedeas Bond

Supersedeas bond not notice of appeal. — While a notice of appeal serves as supersedeas unless a bond is ordered by the court, a supersedeas bond is not, of itself, a notice of appeal. A bond may be required for security as a prerequisite to bringing an appeal but the bond does not, itself, commence the appeal. *Sharpe v. State*, 198 Ga. App. 381, 401 S.E.2d 586 (1991).

Failure to file supersedeas bond is no ground for dismissing appeal. *Thornton v. Burson*, 151 Ga. App. 456, 260 S.E.2d 388 (1979).

Failure to file supersedeas bond is no ground for dismissing appeal, even where superior court finds such failure is willful. *Hawn v. Chastain*, 246 Ga. 723, 273 S.E.2d 135 (1980).

Effect of failure to file supersedeas bond. — Failure to file supersedeas bond simply means that judgment of trial court may be enforced. *Thornton v. Burson*, 151 Ga. App. 456, 260 S.E.2d 388 (1979).

Intent of General Assembly that appeals not be dismissed for failure to post supersedeas bonds is clearly shown by subsection (a), which expressly authorizes dismissal of appeal for nonpayment of costs accrued in lower tribunal after appellant has been directed by superior court to pay such costs. *Hawn v. Chastain*, 246 Ga. 723, 273 S.E.2d 135 (1980).

No authorization for dismissal for failure to file supersedeas bond. — Section 9-11-41(b) does not authorize dismissal of appeal to superior court for failure to comply with order requiring supersedeas bond pursuant to subsection (b) of this section. *Hawn v. Chastain*, 246 Ga. 723, 273 S.E.2d 135 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 314, 323-351.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 320-322, 322-324, 415-425.

ALR. — Liability of surety in appeal bond where there was no supersedeas for costs in court below, 12 ALR 721.

Validity of judgment entered on appeal or supersedeas bond without previous notice and opportunity to be heard, 86 ALR 308.

Amount named in appeal or supersedeas bond as the maximum limit of sureties' liability or as a limitation of the amount which they undertake shall be paid on the judgment appealed from, 87 ALR 257.

Liability on supersedeas bond which was legally insufficient to effect stay, where enforcement of judgment was in fact suspended, 120 ALR 1062.

Condition of bond on appeal not in terms covering payment of money judgment, as

having that effect by implication or construction, 124 ALR 501.

Supersedeas, stay, or bail, upon appeal in habeas corpus, 143 ALR 1354.

When appeal is or is not deemed to have been prosecuted "with effect" or "to effect" within condition of supersedeas bond, 163 ALR 410.

Attorneys' fees paid by appellee in resisting unsuccessful appellate review as damages recoverable on appeal bond, 37 ALR2d 525.

Necessity that person acting in fiduciary or representative capacity give bond to maintain appellate review proceedings, 41 ALR2d 1324.

Check or money as meeting requirement of appeal bond, 65 ALR2d 1134.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 ALR2d 448.

5-3-23. Signature on bond of attorney at law or in fact.

If an appeal is entered by the attorney at law or in fact, he may sign the name of the principal to the appeal bond, if required, and the principal shall be bound thereby as though he had signed it himself. (Orig. Code 1863, § 3537; Code 1868, § 3560; Code 1873, § 3617; Code 1882, § 3617; Civil Code 1895, § 4459; Civil Code 1910, § 5004; Code 1933, § 6-107.)

JUDICIAL DECISIONS

Cited in McCoy v. Sasnett, 77 Ga. App. 819, 49 S.E.2d 913 (1948); Ganns v. Worrell, 216 Ga. 512, 117 S.E.2d 533 (1960); National

Bank v. Little, 115 Ga. App. 327, 154 S.E.2d 624 (1967).

5-3-24. Exemption of executors, administrators, and trustees from paying costs and giving bond.

Executors, administrators, and other trustees, when defending an action as such or defending solely the title of the estate, may enter an appeal without paying costs and giving bond and security as required by Code Section 5-3-22; but, if a judgment should be obtained against such executor, administrator, or other trustee and not the assets of the estate, he must pay costs and give security as in other cases. (Laws 1799, Cobb's 1851 Digest, p. 495; Code 1863, § 3542; Code 1868, § 3565; Code 1873, § 3622; Code 1882, § 3622; Civil Code 1895, § 4464; Civil Code 1910, § 5009; Code 1933, § 6-113.)

Code Commission notes. — The operation of this Code section is confined to appeals from courts other than the probate courts. See *Hobbs v. Cody*, 45 Ga. 478

(1872); *Goodwyn v. Veal*, 50 Ga. App. 657, 179 S.E. 126 (1935), and *Wever v. Wever*, 183 Ga. 453, 188 S.E. 706 (1936).

JUDICIAL DECISIONS

Suit against person as administrator gives him right to appeal without giving security. *Irving v. Melton*, 27 Ga. 330 (1859).

One sued in capacity of administrator need not give security as a prerequisite to appeal provided judgment is to affect only assets of decedent. *McCay v. Devers*, 9 Ga. 184 (1850).

When judgment rendered binds administrator personally, appeal cannot be entered under provisions of this section. *Bryson v. Scott*, 111 Ga. 196, 36 S.E. 619 (1900); *Webb v. Webb*, 24 Ga. App. 464, 101 S.E. 200 (1919).

Administrator appealing from citation for settlement must pay costs. — In citation of administrator or other trustee for settlement in court of ordinary (now probate court), a personal judgment is intended, and when such judgment is rendered, against administrator or other trustee, in order to appeal he must either pay costs or make pauper affidavit required by law; he cannot appeal as administrator or other trustee without paying costs under this section. *Bruce v. Dunn*, 52 Ga. App. 758, 184 S.E. 361 (1936).

Section inapplicable to citation proceedings by distributee against administrator. *Hickman v. Hickman*, 74 Ga. 401 (1884); *Webb v. Webb*, 24 Ga. App. 464, 101 S.E. 200 (1919).

Section inapplicable to annual ex parte

return of administrator. *Adams v. Beall*, 60 Ga. 325 (1878).

Administrator, whose surety has become insolvent pending appeal need not furnish additional security. *Latimer Whiting & Co. v. Administrators of Ware*, 2 Ga. 272 (1847).

Where judgment amended to charge defendant individually. — Where judgment de bonis testatoris was rendered by justice, and defendant, on same day, entered appeal without giving security, and subsequently judgment was amended by justice, so as to charge defendant individually, appeal should not be dismissed because entered without appellant's giving bond and security. *Cannon v. Sheffield*, 59 Ga. 103 (1877).

Defective pauper affidavit filed in appeal by trustee. — Appeal by trustee from judgment against estate shall not be dismissed because defective pauper affidavit was filed. *Sawyer v. Cheney*, 59 Ga. 368 (1877).

Clerk's failure to exact costs does not affect appeal. — If clerk receives appeal from administrator without exacting costs, appeal is good; for clerk, as to all concerned, except appellant, is estopped from saying that he has not received costs. *Crawford v. Cate*, 20 Ga. 69 (1856).

Cited in *Ford v. Redfearn*, 145 Ga. 498, 89 S.E. 611 (1916); *Goodwyn v. Veal*, 50 Ga. App. 657, 179 S.E. 126 (1935); *Wever v. Wever*, 183 Ga. 453, 188 S.E. 706 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 213-217, 328, 329, 341, 346, 351, 370.

C.J.S. — 4 C.J.S., Appeal and Error, § 335.

ALR. — Right of executor or administrator to contest, or appeal from, court's rejection of claim against decedent's estate, 129 ALR 922.

5-3-25. Appeal by partners or joint contractors; signature on bond; appeal by corporation.

When several partners or joint contractors bring or defend an action as such, any one of the partners or joint contractors may enter an appeal in the name of the firm or joint contractors and sign the name of the firm or joint contractors to a bond if required by the superior court, which shall be

binding on the firm and the joint contractors as though they had signed it themselves. In the case of corporations, the appeal may be entered by the president or any agent thereof managing the case or by the attorney of record. (Laws 1838, Cobb's 1851 Digest, p. 589; Code 1863, § 3538; Code 1868, § 3561; Code 1873, § 3618; Code 1882, § 3618; Civil Code 1895, § 4460; Civil Code 1910, § 5005; Code 1933, § 6-108.)

JUDICIAL DECISIONS

Last sentence of section provides for appeals by corporations. *Crumm v. Allen & Co.*, 11 Ga. App. 203, 75 S.E. 108 (1912).

Description term not attached to name. — Dismissal is proper when appeal entered by one without descriptive term attached to his name. *Holston Box & Lumber Co. v. Holcomb*, 30 Ga. App. 651, 118 S.E. 577 (1923).

Requirements of § 5-4-5 are not as strict.

— Requirements of § 5-4-5, as to those who may sign a certiorari bond in behalf of a corporation are not as strict as provisions of this section. *New York Life Ins. Co. v. Rhodes*, 4 Ga. App. 25, 60 S.E. 828 (1908).

Cited in *King Hdwe. Co. v. Bowden*, 113 Ga. 924, 39 S.E. 404 (1901).

RESEARCH REFERENCES

C.J.S. — 4 C.J.S., Appeal and Error, § 178.

ALR. — Survival of liability on joint obligation, 67 ALR 608.

5-3-26. Requirement of written defenses in appeal from justice of the peace court; right to amend pleadings.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1884-85, p. 97, § 1; Civil

Code 1895, § 4139; Civil Code 1910, § 4739; Code 1933, § 6-303.

5-3-27. Amendments to cure defects.

No appeal shall be dismissed because of any defect in the notice of appeal, bond, or affidavit of indigence or because of the failure of the lower court, agency, or other tribunal to transmit the pleadings or other record; but the superior court shall at any time permit such amendments and enter such orders as may be necessary to cure the defect. (Code 1933, § 6-115, enacted by Ga. L. 1972, p. 738, § 5.)

JUDICIAL DECISIONS

Technicalities should not be determinative. — People's right to litigate with governmental bodies should not be decided on technicalities any more than one citizen's right to litigate with another citizen. *City of Atlanta v. International Soc'y for Krishna Consciousness of Atlanta, Inc.*, 240 Ga. 96, 239 S.E.2d 515 (1977).

Effect of filing in wrong court. — Where a notice of appeal from a probate court decision is filed in a timely fashion, the superior court is vested with discretion in determining whether to dismiss the appeal. If the superior court finds that the filing of the notice of appeal in superior court has caused an unreasonable as well as inexcusable delay

in the transmission of the record from the probate court, the appeal should be dismissed. Otherwise, the superior court is authorized to retain the appeal. In that event, the superior court has ample authority under this section to enter an order directing that the probate court transmit the record to the superior court so that the appeal can be decided. *Mack v. Demming*, 248 Ga. 117, 281 S.E.2d 591 (1981).

Filing an independent suit, rather than a notice of appeal in the lower tribunal, was sufficient to vest the superior court with

jurisdiction to decide an appeal from an adverse decision of the mayor and city council, and the superior court was bound to make the determination whether the procedural irregularity caused unreasonable or inexcusable delay. *Hanson v. Wilson*, 257 Ga. 5, 354 S.E.2d 126 (1987).

Cited in *Sims v. American Cas. Co.*, 131 Ga. App. 461, 206 S.E.2d 121 (1974); *Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals*, 147 Ga. App. 128, 248 S.E.2d 196 (1978); *Zornes v. State*, 262 Ga. 757, 426 S.E.2d 355 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 905-915.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 535, 598.

5-3-28. Transmittal of record and transcripts to superior court; issuance of orders and writs.

(a) Within ten days of the filing of the notice of appeal, it shall be the duty of the judge or other official of the court, agency, or tribunal appealed from to cause a true copy of the pleadings, if any, and all other parts of the record (and transcript of evidence and proceedings, where the appeal is not de novo) to be transmitted to the superior court.

(b) The superior court may issue such orders and writs as may be necessary in aid of its jurisdiction on appeal. (Code 1933, § 6-114, enacted by Ga. L. 1972, p. 738, § 5.)

Cross references. — Appeals — probate court transcript not transmitted, Uniform Rules for the Probate Courts, Rule 9.3.

JUDICIAL DECISIONS

Meaning of "pleadings." — In a de novo proceeding, reference to "pleadings" generally refers to entire record sent up to superior court from lower tribunal and not only to appellant's petition for appeal. *Judd v. Valdosta/Lowndes County Zoning Bd. of*

Appeals, 147 Ga. App. 128, 248 S.E.2d 196 (1978).

Cited in *Tony v. Pollard*, 248 Ga. 86, 281 S.E.2d 557 (1981); *Mack v. Demming*, 248 Ga. 117, 281 S.E.2d 591 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 397-400.

5-3-29. De novo investigation.

An appeal to the superior court in any case where not otherwise provided by law is a de novo investigation. It brings up the whole record from the court below; and all competent evidence shall be admissible on the trial thereof, whether adduced on a former trial or not. Either party is entitled to be heard on the whole merits of the case. (Orig. Code 1863, § 3548; Code 1868, § 3571; Code 1873, § 3627; Code 1882, § 3627; Civil Code 1895, § 4469; Civil Code 1910, § 5014; Code 1933, § 6-501; Ga. L. 1972, p. 738, § 8; Ga. L. 1983, p. 884, § 3-1; Ga. L. 1986, p. 982, § 2.)

Editor's notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EFFECT OF APPEAL ON INFERIOR COURT'S JUDGMENT

SCOPE OF APPEAL

PROCEDURAL ISSUES

General Consideration

All parties are brought up under this section whether they have appealed or not. Whether they have appealed or not they all have right to appear and prosecute or defend as the case may be. *Hanie v. Taylor*, 4 Ga. App. 545, 61 S.E. 1054 (1908); *Hunt v. Henderson*, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Jury trial in superior court where factual issues involved. — Under this section an appeal is a de novo investigation, and in superior court appellant cannot be deprived of right of trial by jury if questions of fact are involved. *Goolsby v. Board of Drainage Comm'rs*, 156 Ga. 213, 119 S.E. 644 (1923).

Appeal from court of ordinary (now probate court) brings whole case up for new hearing. *Goodman v. Little*, 213 Ga. 178, 97 S.E.2d 567 (1957).

This Code section provides that on appeal from a probate court all competent evidence shall be admissible in the trial de novo in the superior court and the whole record shall be brought up from below. *Pendley v. Pendley*, 251 Ga. 30, 302 S.E.2d 554 (1983).

Appeal from judgment allowing or refusing homestead. — When appeal is taken

from judgment of ordinary, (now judge of probate court) in allowing or refusing homestead, whole case is brought up by appeal. *Lynch v. Pace*, 40 Ga. 173 (1869); *Kirtland, Babcock & Bronson v. Davis*, 43 Ga. 318 (1871).

Same rule applies in attachment. *J. W. McGarrity & Co. v. Thomas*, 9 Ga. App. 606, 71 S.E. 948 (1911).

Case on appeal from court of ordinary (now probate court) must be tried anew, as if no trial had been had. *Hall v. First Nat'l Bank*, 85 Ga. App. 498, 69 S.E.2d 679 (1952); *Knowles v. Knowles*, 125 Ga. App. 642, 188 S.E.2d 800 (1972); *Mathews v. Mathews*, 136 Ga. App. 833, 222 S.E.2d 609 (1975), cert. denied, 429 U.S. 844, 97 S. Ct. 123, 50 L. Ed. 2d 114 (1976).

Hearing required unless waived. — Although the Superior court is not required to conduct a hearing concerning the merits of the Department of Public Safety's decision to revoke the driver's license of an aggrieved party if the parties waive their right to be heard, the superior court cannot avoid the dictates of this Code section and § 9-10-2 by simply failing to hold a hearing. *Bowman v. Parrot*, 200 Ga. App. 405, 408 S.E.2d 115,

cert. denied, 200 Ga. App. 895, 408 S.E.2d 115 (1991).

Superior court not to review rulings of probate court. — It is not province of superior court on appeal to review and affirm or reverse rulings of ordinary (now judge of probate court), but to try issues anew and pass original judgments on questions involved as if there had been no previous trial. *Hall v. First Nat'l Bank*, 85 Ga. App. 498, 69 S.E.2d 679 (1952); *Knowles v. Knowles*, 125 Ga. App. 642, 188 S.E.2d 800 (1972); *Mathews v. Mathews*, 136 Ga. App. 833, 222 S.E.2d 609 (1975), cert. denied, 429 U.S. 844, 97 S. Ct. 123, 50 L. Ed. 2d 114 (1976).

Distinction between statutory appeal on merits and appeal by writ of error. — Statutory appeal providing for another trial in appellate court on merits of case is altogether different from writ of error on appeal for correction of errors in trial eventuating in judgment from which appeal is taken. In latter proceeding inquiry is into correctness of judgment upon pleading and evidence before trial court. Appellate court affirms or reverses in whole or in part the judgment on review and certifies result to trial court, where final judgment is entered. That procedure has nothing in common with that of a statutory appeal. The statutory appeal allows litigants in certain cases the right to another trial in superior court upon compliance with certain requisites. Trial in superior court is had without reference to evidence introduced in former trial, and is a *de novo* investigation. *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934).

On appeal, it is action and not judgment that is examined. *Abrams v. Lang Sons*, 60 Ga. 218 (1878).

Appeal under § 5-3-2 places matter in superior court for de novo investigation under this section. *Knowles v. Knowles*, 125 Ga. App. 642, 188 S.E.2d 800 (1972).

Relinquishment of de novo appeal to court of appeals. — Defendant, by moving to dismiss his *de novo* appeal from a probate court to a superior court for failure to hold a timely trial under this section, voluntarily relinquished his right to a *de novo* appeal to the court of appeals, and his conviction and sentence imposed by the probate court were, therefore, reinstated. *Bailey v. State*, 184 Ga. App. 890, 363 S.E.2d 172 (1987).

Cited in *Tommey & Stewart v. Finney*, 45 Ga. 155 (1872); *Roberts v. Summers*, 47 Ga.

434 (1872); *In re Moseley*, 17 F. Cas. 886 (S.D. Ga. 1873); *Powell v. Perry*, 63 Ga. 417 (1879); *Fagan v. McTier*, 81 Ga. 73, 6 S.E. 177 (1888); *Brodhead v. Shoemaker*, 44 F. 518, 111 L.R.A. 567 (N.D. Ga. 1890); *Freeman v. Carr & Bro.*, 104 Ga. 718, 30 S.E. 935 (1898); *Bryson v. Scott*, 111 Ga. 196, 36 S.E. 619 (1900); *Robinson v. McAlpin*, 130 Ga. 489, 61 S.E. 115 (1908); *Central Ga. Power Co. v. Cornwell*, 139 Ga.-1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912); *Willingham v. Buckeye Cotton Oil Co.*, 13 Ga. App. 253, 79 S.E. 496 (1913); *Byers v. Byers*, 41 Ga. App. 671, 154 S.E. 456 (1930); *Hill v. Hill*, 55 Ga. App. 500, 190 S.E. 411 (1937); *State Hwy. Bd. v. Long*, 61 Ga. App. 173, 6 S.E.2d 130 (1939); *Forrester v. Pullman Co.*, 66 Ga. App. 745, 19 S.E.2d 330 (1942); *Rabun v. Planters Cotton Oil Co.*, 68 Ga. App. 37, 21 S.E.2d 922 (1942); *Allen v. Allen*, 71 Ga. App. 272, 30 S.E.2d 665 (1944); *Bethea County v. Dixon*, 72 Ga. App. 384, 33 S.E.2d 723 (1945); *Hartley v. Holwell*, 202 Ga. 724, 44 S.E.2d 896 (1947); *Anderson v. Smith*, 76 Ga. App. 171, 45 S.E.2d 282 (1947); *Jones v. Cannady*, 78 Ga. App. 453, 51 S.E.2d 551 (1949); *Roe v. Pitts*, 82 Ga. App. 770, 62 S.E.2d 387 (1950); *Oxford v. Farr*, 98 Ga. App. 776, 106 S.E.2d 911 (1958); *McCray v. First Nat'l Bank*, 103 Ga. App. 506, 120 S.E.2d 26 (1961); *Brumbelow v. Brumbelow*, 111 Ga. App. 665, 142 S.E.2d 855 (1965); *Ingram v. Rooks*, 221 Ga. 701, 146 S.E.2d 743 (1966); *Undercofler v. White*, 113 Ga. App. 853, 149 S.E.2d 845 (1966); *Hodges v. Libbey*, 120 Ga. App. 246, 170 S.E.2d 37 (1969); *Olley Valley Estates, Inc. v. Fussell*, 232 Ga. 779, 208 S.E.2d 801 (1974); *Edge v. Edge*, 134 Ga. App. 162, 213 S.E.2d 540 (1975); *Ledford v. Farrow*, 134 Ga. App. 591, 215 S.E.2d 344 (1975); *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 217 S.E.2d 304 (1975); *Weeks v. Gwinnett County Bd. of Tax Equalization*, 139 Ga. App. 37, 227 S.E.2d 865 (1976); *Carter v. Carter*, 139 Ga. App. 548, 228 S.E.2d 708 (1976); *McKnight v. Mitchell*, 142 Ga. App. 344, 235 S.E.2d 763 (1977); *City of Smyrna v. Ruff*, 240 Ga. 250, 240 S.E.2d 19 (1977); *Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals*, 147 Ga. App. 128, 248 S.E.2d 196 (1978); *Hunter v. Hunter*, 149 Ga. App. 324, 254 S.E.2d 477 (1979); *Rawlins v. Rawlins*, 150 Ga. App. 534, 258 S.E.2d 187 (1979); *Tony v. Pollard*, 248 Ga. 86, 281 S.E.2d 557 (1981); *Smith v.*

General Consideration (Cont'd)

Smith, 165 Ga. App. 532, 301 S.E.2d 696 (1983); Gay v. Farley, 255 Ga. 174, 336 S.E.2d 235 (1985); General Accident Ins. Co. v. Wells, 179 Ga. App. 440, 346 S.E.2d 886 (1986); Anderson v. City of Alpharetta, 187 Ga. App. 148, 369 S.E.2d 521 (1988); Walton v. State, 261 Ga. 392, 405 S.E.2d 29 (1991); Barmore v. Himebaugh, 200 Ga. App. 868, 410 S.E.2d 46 (1991).

Effect of Appeal on Inferior Court's Judgment

Judgment appealed from and opposite judgment in superior court might both be free of error. — It is quite obvious that, with such latitude as to evidence as is given by this section, the judgment appealed from and a directly opposite judgment in appellate court, might both be free from error — each of them might be absolutely correct on the facts submitted, and the law applicable thereto. *Abrams v. Lang, Sons*, 60 Ga. 218 (1878).

Appeal from court of ordinary (now probate court) suspends, but does not vacate judgment. *Snell v. Lopez*, 91 Ga. App. 552, 86 S.E.2d 363 (1955).

Justice's court judgment remains operative, but incapable of enforcement pending appeal. *Tilley v. King*, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

Judgment against joint defendant is suspended pending appeal of nonsuit. — As to other joint defendant where maker and endorser of promissory note are jointly sued and judgment rendered against endorser and nonsuit as to maker, judgment against endorser is suspended until rendition of case on appeal. *Turnell v. Carter*, 5 Ga. App. 847, 64 S.E. 114 (1909).

Where appellee is successful on appeal, lien of judgment is binding from date originally rendered. — Where on appeal from judgment in justice's court appellee is successful, lien of judgment will be taken as binding from date of its original rendition, and entitled to superiority over subsequently rendered judgment, notwithstanding provisions of § 9-12-88. *Tilley v. King*, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

An appeal from a decision of a magistrate court is "a de novo investigation," in which the magistrate court's decision on the merits of the claim has no bearing. *Howe v. Roberts*, 259 Ga. 617, 385 S.E.2d 276 (1989).

Scope of Appeal

On appeal, either party is entitled to be heard on whole merits of case. *Mathews v. Mathews*, 136 Ga. App. 833, 222 S.E.2d 609 (1975), cert. denied, 429 U.S. 844, 97 S. Ct. 123, 50 L. Ed. 2d 114 (1976).

Duty of superior court upon overruling objections to petition. — If judge of superior court overrules demurrer (now motion to dismiss) and objections to petition to set aside judgment of court of ordinary (now probate court) it is his duty to try issues made by such petition and defensive pleadings. *Hall v. First Nat'l Bank*, 85 Ga. App. 498, 69 S.E.2d 679 (1952).

Appeal imparts same jurisdiction as was possessed by inferior court. — Appeal from court of ordinary (now probate court) brings whole case up for new hearing but with same jurisdiction as was possessed by court of ordinary. *Knowles v. Knowles*, 125 Ga. App. 642, 188 S.E.2d 800 (1972).

Superior court on trial of appeal from court of ordinary (now probate court) has no broader powers than court of ordinary itself had. *Goodman v. Little*, 213 Ga. 178, 97 S.E.2d 567 (1957).

Superior court, on appeal from court of ordinary, (now probate court) has no broader jurisdiction than that of court of ordinary. *Snell v. Lopez*, 91 Ga. App. 552, 86 S.E.2d 363 (1955).

Where guardian seeks compensation for unsuccessful effort by him, as attorney at law and in apparent good faith, to have order of court of ordinary (now probate court) granting encroachment upon estates of his wards modified, set aside, or vacated, superior court on de novo appeal is vested with same discretion in matter that court of ordinary had. *Whitehurst v. Singletary*, 77 Ga. App. 811, 50 S.E.2d 80 (1948).

Rulings of inferior court as to law and facts may be adjudicated de novo on appeal. *Garrison v. McGuire*, 114 Ga. App. 665, 152 S.E.2d 624 (1966).

Issues allowable on appeal. — Any issue that may be made before tribunal originally hearing case, may be made on appeal

thereof to superior court, where such appeal is a de novo investigation. *City of Griffin v. Southeastern Textile Co.*, 79 Ga. App. 420, 53 S.E.2d 921 (1949).

Evidence which may be introduced. — The purpose of this section is to provide the parties to an appeal a de novo hearing, and “all competent evidence” may be introduced in the superior court regardless of whether it was submitted below. *Lee v. Wainwright*, 256 Ga. 478, 350 S.E.2d 238 (1986).

Appeal to superior court from probate court is a de novo investigation, and competent evidence may be heard which was not introduced in probate court. *Dukes v. Joyner*, 234 Ga. 526, 216 S.E.2d 822 (1975).

Restriction on presentation of new matters on appeal. — While an appeal to the superior court from the probate court is a de novo investigation, the trial in the superior court is not a trial without limitation but is a new trial in which only the matter presented to the court below can be relitigated. *Williams v. Calloway*, 171 Ga. App. 286, 319 S.E.2d 500 (1984).

Suit on appeal is subject to attacks upon jurisdiction which could have been made below. — Since appeal from court of ordinary (now probate court) to superior court is a de novo proceeding, any defense or attack upon jurisdiction which could have been made in the court of ordinary can be made in superior court on appeal. *Cromer v. Chambers*, 104 Ga. App. 196, 121 S.E.2d 397 (1961).

In case pending in superior court on appeal from judgment of justice of peace, defendant may plead any defense, including plea to jurisdiction of justice's court, which he could have pleaded in that court, irrespective of whether, upon trial of case therein, this defense was pleaded. *Smith v. Atlanta Mut. Ins. Co.*, 42 Ga. App. 254, 155 S.E. 535 (1930).

Superior court may hear and sustain demurrer (now motion to dismiss) previously heard and overruled in county court. *Bowman v. Bowman*, 79 Ga. App. 240, 53 S.E.2d 244 (1949).

Application of section to appeal from dismissal by probate court for want of jurisdiction. — See *Touchton v. Stewart*, 222 Ga. 455, 150 S.E.2d 643 (1966).

Striking defendant on appeal discharges him from any liability in cause of action. —

As hearing is de novo, striking defendant on appeal against whom judgment was rendered in justice's court operates to discharge such defendant from any liability in cause of action. *Hanie v. Taylor*, 4 Ga. App. 545, 61 S.E. 1054 (1908).

City charter provision permitting appeals from tax assessments to superior court. — Where city charter provides that a tax assessment may be appealed from taxing authorities of city to superior court, there to be disposed of as other appeal cases, such appeal is a de novo investigation and brings up the whole record, to be tried anew in superior court. *City of Griffin v. Southeastern Textile Co.*, 79 Ga. App. 420, 53 S.E.2d 921 (1949).

Procedural Issues

Generally, same procedural rules apply in de novo review as in trials of other civil cases. *Brown v. Frachiseur*, 247 Ga. 463, 277 S.E.2d 16 (1981).

Defendant, though not joining in appeal, may make any timely and appropriate amendments to plea or answer already entered. *Murray v. Marshall*, 106 Ga. 522, 32 S.E. 634 (1899).

No greater duty is placed upon appellant to bring case to trial than upon appellee. While it is true that appellant is the moving party as far as appeal is concerned, once appeal and supporting record is docketed in superior court, it is entitled to de novo treatment. *Etheridge v. Etheridge*, 242 Ga. 101, 249 S.E.2d 569 (1978).

Appeal must include certified judgment or record. — Where there is no certified judgment or record before superior court as to judgment rendered by appeals board, appeal to superior court is incomplete. *Fletcher v. Daniels*, 211 Ga. 403, 86 S.E.2d 232 (1955).

Failure of magistrate to send up judgment rendered by him is no ground for dismissal. *Pearce & Renfroe v. Renfroe Bros.*, 68 Ga. 194 (1881).

Absence of party. — Appeal, unlike an action, should not be dismissed because of absence of either party. *Rousch v. Green*, 2 Ga. App. 112, 58 S.E. 313 (1907).

Judgment on merits of affidavit of illegality does not preclude motion to dismiss affidavit on appeal. — That plaintiff in fi. fa. went to trial in justice's court on merits of

Procedural Issues (Cont'd)

affidavit of illegality, where judgment was rendered against illegality, did not preclude plaintiff in fi. fa. from making motion to dismiss affidavit of illegality on call of case in superior court, to which defendant had appealed under this section. *Norris v. Carter & Nelson*, 32 Ga. App. 607, 124 S.E. 144 (1924).

Party may invoke summary judgment procedure in appeal to superior court. — An appeal to superior court from court of ordinary (now probate court) is subject to established procedures for civil actions, thus entitling a party to invoke summary judgment procedure. *Woodall v. First Nat'l Bank*, 118 Ga. App. 440, 164 S.E.2d 361 (1968).

It is not reversible error to allow jury to know outcome in inferior court. *Kelley v. Kelley*, 129 Ga. App. 257, 199 S.E.2d 399 (1973).

Letting jury know what judgment was rendered below will not render its verdict void,

although it is not a proper practice. *Humphrey v. Johnson*, 143 Ga. 703, 85 S.E. 830 (1915).

Reliance by jury upon record below in reaching its decision. — Jury in superior court proceeding under this section does not review and affirm or reverse rulings of probate judge, but hears all issues anew as if there had been no previous trial, and if it relies upon record below or allows it to influence its decision, reversible error is committed. *Allmond v. Johnson*, 153 Ga. App. 59, 264 S.E.2d 544 (1980).

Summary judgment available in appeal from probate court's award for support. — An appeal of an application for a year's support award by a probate court is a de novo proceeding in the superior court, and as such, the appeal is subject to the established procedures for civil actions, thus entitling a party to invoke summary judgment. *Bright v. Knecht*, 182 Ga. App. 820, 357 S.E.2d 159 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Justices of the Peace, §§ 102-120.

C.J.S. — 5 C.J.S., Appeal and Error, §§ 756-765.

ALR. — Review on appeal of evidence as to genuineness of disputed documents, 6 ALR 507; 12 ALR 212; 27 ALR 319.

May new trial or reversal for error as to measure of damages against one or more of the parties be restricted to those parties, 32 ALR 255.

First decision of intermediate court as law of the case on appeal to court of last resort from subsequent decision, 41 ALR 1078; 118 ALR 1286.

Evidence erroneously stricken out as proper for consideration by appellate court to sustain finding or verdict, 152 ALR 371.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

5-3-30. Term of trial in superior or state court; waiver of trial by jury.

All appeals to the superior court or state court shall be tried by a jury at the first term after the appeal has been entered unless good cause is shown for continuance; provided, however, that trial by jury may be waived by the consent of both parties to trial by the court without a jury as provided in Code Section 9-11-39. (Laws 1805, Cobb's 1851 Digest, p. 183; Laws 1823, Cobb's 1851 Digest, p. 497; Code 1863, § 3551; Code 1868, § 3574; Code 1873, § 3630; Code 1882, § 3630; Civil Code 1895, § 4472; Civil Code 1910, § 5017; Code 1933, § 6-601; Ga. L. 1988, p. 253, § 1.)

JUDICIAL DECISIONS

Language of section is obligatory. — Language of section is obligatory, especially where it concerns and affects public interest as well as interest of appellant and failure to comply, unless excusable, will result in dismissal. *Huber v. State*, 140 Ga. App. 148, 230 S.E.2d 105 (1976).

Constitutional right to jury trial in dispossessory actions. — Where the appellants had sought a jury trial in a local magistrate court on the issue of possession in a landlord-tenant dispute, the appellee denied the appellants' request, the appellants filed a writ of prohibition against the appellee in the superior court, and the superior court denied the appellants' writ and issued a certificate of immediate review to the Supreme Court of Georgia, the magistrate court did not err in denying the appellants a jury trial, since the right to jury trial on appeal is expressly given in this Code section, and the appellants are not being denied a jury trial, but instead, only endure a procedural delay in the magistrate court before receiving a jury trial on appeal to the state or superior court. *Hill v. Levenson*, 259 Ga. 395, 383 S.E.2d 110 (1989).

Control of calendars and trial of cases are procedures in hands of court, not counsel. *Etheridge v. Etheridge*, 242 Ga. 101, 249 S.E.2d 569 (1978); *Lackey v. DeKalb County*, 156 Ga. App. 309, 274 S.E.2d 705 (1980).

No greater duty is placed upon appellant than upon appellee to bring case to trial. *Lackey v. DeKalb County*, 156 Ga. App. 309, 274 S.E.2d 705 (1980).

If court does not reach case during first term after entry, neither party is penalized. — It being express command of this section that appeal cases be tried by jury at first term after appeal has been entered, it would appear duty of clerk to place same upon trial calendar for first term after docketing. If it cannot be reached at that term, or should

court otherwise defer the matter, neither party should be penalized because it has not been reached. *Etheridge v. Etheridge*, 242 Ga. 101, 249 S.E.2d 569 (1978); *Lackey v. DeKalb County*, 156 Ga. App. 309, 274 S.E.2d 705 (1980).

Jury is required on trial of appeals from county court to superior court. *Johnson v. Ford*, 92 Ga. 751, 19 S.E. 712 (1894).

Jury is to be taken from panels of traverse jurors and not from grand juries. *Cronan v. Roberts & Co.*, 65 Ga. 678 (1880).

Jury trial in guardianship proceedings. — The legitimate public interest in an incapacitated adult's welfare, coupled with statutory scheme requiring a jury trial in appeals to the superior court from the probate court, compelled the conclusion that a jury trial was required in guardianship proceeding. *In re Boles*, 172 Ga. App. 111, 322 S.E.2d 319 (1984).

Judge may direct verdict for defendant where demanded by evidence. *Callaway & Truitt v. Southern Ry.*, 126 Ga. 192, 55 S.E. 22 (1906).

Letting jury know what judgment was rendered below will not render its verdict void, although it is not a proper practice. *Humphrey v. Johnson*, 143 Ga. 703, 85 S.E. 830 (1915).

Cited in *Montgomery v. Fouché*, 125 Ga. 43, 53 S.E. 767 (1906); *Culver v. Pierce*, 148 Ga. 300, 96 S.E. 497 (1918); *Goolsby v. Board of Drainage Comm'rs*, 156 Ga. 213, 119 S.E. 644 (1923); *Jones v. Cannady*, 78 Ga. App. 453, 51 S.E.2d 551 (1949); *United States v. Raines*, 189 F. Supp. 121 (M.D. Ga. 1960); *Gifford v. Courson*, 224 Ga. 840, 165 S.E.2d 133 (1968); *Bell v. Cronin*, 248 Ga. 457, 283 S.E.2d 476 (1981); *Anderson v. City of Alpharetta*, 187 Ga. App. 148, 369 S.E.2d 521 (1988); *Walton v. State*, 261 Ga. 392, 405 S.E.2d 29 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Justices of the Peace, § 104.

5-3-31. Damages assessed for frivolous appeals.

If upon the trial of any appeal it shall appear to the jury that the appeal was frivolous and intended for delay only, they shall assess damages against the appellant and his security, if any, in favor of the appellee for such delay, not exceeding 25 percent on the principal sum which they shall find due, which damages shall be specially noted in their verdict. (Laws 1799, Cobb's 1851 Digest, p. 495; Code 1863, § 3552; Code 1868, § 3575; Ga. L. 1868, p. 132, § 2; Code 1873, § 3631; Code 1882, § 3631; Civil Code 1895, § 4473; Civil Code 1910, § 5018; Code 1933, § 6-602; Ga. L. 1983, p. 884, § 3-2.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION ASSESSMENT OF DAMAGES APPLICATION

General Consideration

Purpose of section. — Purpose of this section is to inflict punishment and to compensate respondent for delay, costs and vexation caused by frivolous appeal. *Garrison v. Wilcoxson*, 11 Ga. 154 (1852); *Adams v. Carnes*, 111 Ga. 505, 36 S.E. 597 (1900); *Hardy v. Truitt*, 20 Ga. App. 529, 93 S.E. 149 (1917).

To justify assessment of damages, appeal must be both frivolous and intended for delay. *Gunnels v. Deavours*, 57 Ga. 177 (1876).

When appeal deemed for purpose of delay. — Appeal is intended to delay only when entirely without merit and entered merely to postpone creditor in collection of debt. *Clark v. Fee*, 86 Ga. 9, 12 S.E. 181 (1890).

Appellant's failure to submit evidence, by itself, is not conclusive of issue of intent to delay. *Gilmore v. Wright*, 20 Ga. 198 (1856).

In determining whether appeal is frivolous and intended to delay, jury must consider all evidence. *Garrison v. Wilcoxson*, 11 Ga. 154 (1852).

Cited in *Tommey & Stewart v. Finney*, 45 Ga. 155 (1872); *Robinson v. Medlock*, 59 Ga. 598 (1877).

Assessment of Damages

For determination by jury. — Amount of damages (under subsection (a)) is for determination by jury, uninfluenced by opinion of court. *McMillan v. Lawrence, Smith &*

Whilden, 25 Ga. 189 (1858).

Appropriate considerations in determining damages under section. — See *McMillan v. Lawrence, Smith & Whilden*, 25 Ga. 189 (1858).

Maximum award only in extreme cases. — Only in extreme cases should 25 percent maximum damages under subsection (a) be awarded. *McMillan v. Lawrence, Smith & Whilden*, 25 Ga. 189 (1858).

Application

This section applies only to appeals which are de novo investigations. *Butlerhouse Maintenance Co. v. Greeson*, 174 Ga. App. 637, 331 S.E.2d 46 (1985).

Section applicable only to cases where money verdicts are rendered. — Inasmuch as provisions of section are necessarily applicable to those cases only in which money verdicts are rendered, it cannot be enforced in claim cases. *Adams v. Carnes*, 111 Ga. 505, 36 S.E. 597 (1900).

Section applicable to appeal by garnishee. *Davis v. Rhodes*, 112 Ga. 106, 37 S.E. 169 (1900).

Section not applicable to appeal of Workers' Compensation Board decisions. — The provisions of this section providing for the award of attorney's fees against a party bringing a frivolous appeal do not apply to appeals to the superior court of decisions of the Workers' Compensation Board pursuant to § 34-9-105. *Butlerhouse Maintenance Co.*

v. Greeson, 174 Ga. App. 637, 331 S.E.2d 46 (1985).

Appeal presenting bona fide contest or seeking ruling on open or doubtful question.

— If, after reviewing whole matter the court believes that plaintiff in error is presenting a bona fide contest over a colorable matter, though his view of the law may not in fact be well founded, or that he is seeking a ruling

upon an open or doubtful question, damages will be refused. *United States Fid. & Guar. Co. v. Blankenship Plumbing Co.*, 153 Ga. App. 335, 265 S.E.2d 66 (1980).

Property alienated pending appeal is bound for payment of damages for frivolous appeal just as it is for payment of the rest of the amount of appeal judgment. *Phillips v. Behn & Foster*, 19 Ga. 298 (1856).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, § 1024.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 81, 342, 395, 587. 5 C.J.S., Appeal and Error, § 637.

ALR. — Award of damages for dilatory tactics in prosecuting appeal in state court, 91 ALR3d 661.

APPEAL AND ERROR

CHAPTER 4

CERTIORARI TO SUPERIOR COURT

Sec.		Sec.	
5-4-1.	When certiorari shall lie; exception.	5-4-12.	Grounds of error considered generally; scope of review; technical distinctions abolished.
5-4-2.	Petition for certiorari to probate judge generally.	5-4-13.	Grant of writ for failure to prove venue or time of criminal offense.
5-4-3.	Petition for certiorari to inferior judicatories generally.	5-4-14.	Dismissal or return of writ to lower court with instructions; entry by superior court of final decision where no questions of fact involved.
5-4-4.	Petition for certiorari in appeal case tried by jury in justice of the peace court generally [Repealed].	5-4-15.	Requirement of new trial when writ not answered.
5-4-5.	Bond and security required; certificate of payment of costs; oath of security; affidavit of indigence.	5-4-16.	Recovery of costs by plaintiff where certiorari sustained; recovery of costs by plaintiff where certiorari returned to lower court for new trial.
5-4-6.	Time for application for writ; filing of petition; service of petition and writ.	5-4-17.	Recovery of costs by defendant generally.
5-4-7.	Time for filing of answer; manner of service; effect of failure to perfect service.	5-4-18.	Recovery of damages for frivolous certiorari.
5-4-8.	Writing or dictation of answer by parties, attorneys, or interested persons; when verification required.	5-4-19.	Operation of writ of certiorari as supersedeas in civil cases.
5-4-9.	Filing of traverse or exception to answer; perfection of answer.	5-4-20.	Supersedeas of criminal conviction; bond; affidavit of indigence; effect of supersedeas.
5-4-10.	Amendment of petition, bond, answer, and traverse.		
5-4-11.	Conduct of hearing generally; trial by jury.		

Cross references. — See Ga. Const. 1983, Art. VI, Sec. 1, Para. IV. As to procedure for appeals from decisions of superior court reviewing decisions of lower courts by certiorari, see § 5-6-35. As to description of extent

of authority of superior court to exercise appellate jurisdiction and to exercise general supervision over all inferior tribunals, see § 15-6-8.

JUDICIAL DECISIONS

Includable grounds. — For certiorari, petition must set forth all of grounds asserted as error but may include only those grounds that were insisted upon at trial or hearing. Further, where it does not appear from the

record that those issues were made in the trial court, they can not be raised by certiorari in the superior court, or reviewed in the Court of Appeals. *Willis v. Jackson*, 148 Ga. App. 432, 251 S.E.2d 341 (1978).

RESEARCH REFERENCES

ALR. — Payment of fine, serving sentence, or discharge on habeas corpus, as waiver of right to review conviction, 18 ALR 867; 74 ALR 638.

5-4-1. When certiorari shall lie; exception.

(a) The writ of certiorari shall lie for the correction of errors committed by any inferior judicatory or any person exercising judicial powers, including the judge of the probate court, except in cases touching the probate of wills, granting letters testamentary, and of administration.

(b) Notwithstanding subsection (a) of this Code section, the writ of certiorari shall not lie in civil cases in the probate courts which are provided for by Article 6 of Chapter 9 of Title 15. (Orig. Code 1863, § 3957; Code 1868, § 3977; Code 1873, § 4049; Code 1882, § 4049; Civil Code 1895, § 4634; Civil Code 1910, § 5180; Code 1933, § 19-101; Ga. L. 1986, p. 982, § 3.)

Editor's notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

Law reviews. — For annual survey on trial practice and procedure, see 38 Mercer L. Rev. 383 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
DECISIONS SUBJECT TO REVIEW BY CERTIORARI

WHAT IS JUDICIAL ACTION

- 1. IN GENERAL
- 2. APPLICATION

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under former Code Section 5-4-4 are included in the annotations for this Code Section.

Section provides for review of decisions in exercise of judicial powers. — Certiorari under this section is a remedy whereby a litigant may have review of judgment or decision of inferior judicatory or a person exercising judicial powers. *Richardson v. Rector*, 134 Ga. App. 116, 213 S.E.2d 488 (1975).

Legislative intent behind provision. — It was intention of framers of Constitution, and of legislature, to provide writ of certiorari to superior courts to all persons dissatisfied with judgments of inferior judicatories and who desire to have those judgments cor-

rected by superior court. *Cochran v. City of Rockmart*, 242 Ga. 732, 251 S.E.2d 259 (1978).

Right of certiorari is a constitutional right. *Wrenn v. Bowden*, 56 Ga. App. 713, 193 S.E. 456 (1937).

Constitutional as well as a statutory remedy. The legislature has provided by general law the manner and means for carrying out Ga. Const. 1976, Art. VI, Sec. IV, Para. V (see Ga. Const. 1983, Art. VI, Sec. I, Para. IV). *Cochran v. City of Rockmart*, 242 Ga. 732, 251 S.E.2d 259 (1978).

Constitutional limitation on legislature's power to provide for superior court review. — The only power and authority given by Constitution to superior courts to correct errors in inferior courts, is by writ of certiorari. The legislature has no power to provide other means than those prescribed in the

General Consideration (Cont'd)

Constitution for correcting errors in inferior courts by superior courts. *Cochran v. City of Rockmart*, 242 Ga. 732, 251 S.E.2d 259 (1978).

Where errors complained of are sufficient to authorize certiorari, it should not be refused. — Where errors complained of in petition for certiorari were sufficient in law to have authorized judge to have sanctioned certiorari under this section and § 5-4-3, it was error to refuse to do so. *McCardle v. Fogarty*, 41 Ga. 626 (1871).

Superior courts cannot review judgments in criminal cases on petition by state or municipality. — It has been repeatedly held, notwithstanding general right to correct errors in inferior judicatories by writ of certiorari, that superior court without jurisdiction to review judgment of inferior court in criminal case on petition by state or municipality. *State v. B'Gos*, 175 Ga. 627, 165 S.E. 566 (1932).

If there is specific remedy by certiorari, remedy of mandamus does not exist. *Hayes v. Brown*, 205 Ga. 234, 52 S.E.2d 862 (1949).

Writ of certiorari as full and adequate remedy at law. — Writ of certiorari ordinarily furnishes a full and adequate remedy at law for correction of errors in decisions by municipal corporations, courts or councils, rendered in exercise of judicial powers; so that even though a property right may be primarily involved in such manner as would authorize injured party to resort to equity, he is not entitled to claim such relief, where he has already appeared before municipal judicatory, and that body has rendered an adverse decision. *Ballard v. Mayor of Carrollton*, 194 Ga. 489, 22 S.E.2d 81 (1942); *Wilson v. Latham*, 227 Ga. 530, 181 S.E.2d 830, cert. denied, 404 U.S. 955, 92 S. Ct. 312, 30 L. Ed. 2d 272 (1971).

Payment of fine imposed by inferior court generally precludes certiorari. — Defendant who has paid fine imposed by police court, with alternative of imprisonment, cannot, after paying such fine, prosecute writ of error to review judgment, unless fine was paid under protest and under duress. *Ellett v. City of College Park*, 135 Ga. App. 269, 217 S.E.2d 374 (1975).

Writ of certiorari from justice's court lies only after final determination of case. —

Writ of certiorari does not lie from decision of justice of peace, in case pending in justice's court, until after final determination of case in which decision was made. *Felker v. Freeman*, 46 Ga. App. 767, 169 S.E. 247 (1933).

Judgment of justice of peace refusing to allow amendment to petition is not final determination. *Felker v. Freeman*, 46 Ga. App. 767, 169 S.E. 247 (1933).

Review of recorder's court decisions. — The proper method for obtaining review of a decision of a recorder's court is either by direct appeal to the superior court, in the case of traffic violations, or by application for certiorari to the superior court. *Franklin v. Recorder's Court*, 174 Ga. App. 498, 330 S.E.2d 429 (1985).

Review limited to record of hearing below. — Review under this Code section is limited to matters raised in the record of the hearing below. *Baxter v. Fulton-DeKalb Hosp. Auth.*, 764 F. Supp. 1510 (N.D. Ga. 1991).

Certiorari available irrespective of questions or amount involved. — After verdict has been rendered by jury in justice's court, certiorari is available to party dissatisfied, in all cases, irrespective of character of questions involved or amount in controversy. *Brown & Bigelow v. Parian Paint Co.*, 4 Ga. App. 632, 62 S.E. 95 (1908) (decided under former § 5-4-4).

Verdict, not judgment, is reviewed on certiorari under section. *Western & A.R.R. v. Carson*, 70 Ga. 388 (1883) (decided under former § 5-4-4).

Certiorari will not lie where appeal to jury in superior court has been entered. *Miller v. Hensley*, 65 Ga. 556 (1880); *Boroughs v. White & Stone*, 69 Ga. 841 (1883); *Neal v. Fox*, 114 Ga. 164, 39 S.E. 860 (1901) (decided under former § 5-4-4).

Certiorari may be refused where evidence supports verdict. *Stewart v. Murray*, 14 Ga. App. 438, 81 S.E. 382 (1914) (decided under former § 5-4-4).

Certiorari may be refused although preponderance of evidence may be in favor of defendant. *Mitchell v. Bennett*, 17 Ga. App. 657, 87 S.E. 1092 (1916) (decided under former § 5-4-4).

Answer must show that verdict was rendered. *Southern Ry. v. Chestnut Mt. Merchandise Co.*, 1 Ga. App. 731, 58 S.E. 247 (1907) (decided under former § 5-4-4).

Answer's failure to show that verdict was rendered will result in dismissal. *Manning v. Mayor of Gainesville*, 125 Ga. 239, 53 S.E. 1002 (1906) (decided under former § 5-4-4).

Cited in *Johnston v. Brenau College-Conservatory*, 146 Ga. 182, 91 S.E. 85 (1916); *Daniels v. Commissioners of Pilotage*, 147 Ga. 295, 93 S.E. 887 (1917); *Von Schmidt v. Noland Co.*, 176 Ga. 784, 169 S.E. 11 (1933); *McDonald v. Georgia Fed'n of Labor*, 178 Ga. 313, 173 S.E. 662 (1933); *Gullatt v. Slaton*, 189 Ga. 758, 8 S.E.2d 47 (1940); *Butler v. City of Dublin*, 191 Ga. 551, 13 S.E.2d 362 (1941); *City of Atlanta v. Lopert Pictures Corp.*, 217 Ga. 432, 122 S.E.2d 916 (1961); *Murdock v. Perkins*, 219 Ga. 756, 135 S.E.2d 869 (1964); *Manning v. A.A.B. Corp.*, 223 Ga. 111, 153 S.E.2d 561 (1967); *Freeman v. City of Valdosta*, 119 Ga. App. 345, 167 S.E.2d 170 (1969); *Sonesta Int'l Hotels Corp. v. Colony Square Co.*, 482 F.2d 281 (5th Cir. 1973); *McClung v. Richardson*, 232 Ga. 530, 207 S.E.2d 472 (1974); *Shantha v. Municipal Court*, 240 Ga. 280, 240 S.E.2d 32 (1977); *Housworth v. Glisson*, 485 F. Supp. 29 (N.D. Ga. 1978); *Mulling v. Wilson*, 245 Ga. 773, 267 S.E.2d 212 (1980); *Board of Trustees v. Christy*, 154 Ga. App. 488, 269 S.E.2d 33 (1980); *Kariuki v. DeKalb County*, 253 Ga. 713, 324 S.E.2d 450 (1985); *Lee v. Hutson*, 810 F.2d 1030 (11th Cir. 1987); *Hunter v. City of Warner Robins*, 842 F. Supp. 1460 (M.D. Ga. 1994).

Decisions Subject to Review by Certiorari

Availability generally. — The writ of certiorari to the superior court is a constitutional as well as statutory remedy available where a party is dissatisfied with a decision or judgment of an inferior judicatory exercising judicial or quasi-judicial powers. *Flacker v. Berr-Nash Corp.*, 157 Ga. App. 638, 278 S.E.2d 180 (1981), overruled on other grounds, *Smith v. Elder*, 174 Ga. App. 316, 329 S.E.2d 511 (1985).

Function of writ of certiorari is to review erroneous verdict or judgment. *Gilbert v. Land Estates, Inc.*, 62 Ga. App. 845, 9 S.E.2d 914 (1940).

Certiorari lies to correct judgments which are irregular or erroneous. *Sawyer v. City of Blakely*, 2 Ga. App. 159, 58 S.E. 399 (1907); *McDonald v. Farmers Supply Co.*, 143 Ga. 552, 85 S.E. 861 (1915).

Judgments which are wholly void. — Writ of certiorari unavailable to set aside verdict or judgment which is absolutely void. *City of Cedartown v. Pickett*, 193 Ga. 840, 20 S.E.2d 263 (1942), criticized, *Frese v. Link*, 76 Ga. App. 709, 47 S.E.2d 170 (1948); *Thompson v. Allen*, 69 Ga. App. 638, 26 S.E.2d 490 (1943).

Certiorari does not lie as to judgments which are wholly void. *Sawyer v. City of Blakely*, 2 Ga. App. 159, 58 S.E. 399 (1907); *McDonald v. Farmers Supply Co.*, 143 Ga. 552, 85 S.E. 861 (1915).

Writ of certiorari does not lie to set aside a void finding or judgment. *Anderson v. Ledbetter-Johnson Contractors*, 62 Ga. App. 732, 9 S.E.2d 860 (1940).

Entities whose decisions are reviewable.

— Writ of certiorari lies for correction of errors in decisions by municipal corporations, courts or councils, like other inferior judicatories, when rendered in exercise of their judicial powers. *City of Cedartown v. Pickett*, 193 Ga. 840, 20 S.E.2d 263 (1942); *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Termination of city employee. — A city manager's decision approving the termination of a city employee was subject to review by a petition for a writ of certiorari. *Salter v. City of Thomaston*, 200 Ga. App. 536, 409 S.E.2d 88 (1991).

Exercises of legislative, executive or ministerial functions. — Certiorari is not an appropriate remedy to review or obtain relief from judgment, decision or action of inferior judicatory or body rendered in exercise of legislative, executive or ministerial functions. *City of Cedartown v. Pickett*, 193 Ga. 840, 20 S.E.2d 263 (1942); *Presnell v. McCollum*, 112 Ga. App. 579, 145 S.E.2d 770 (1965); *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

In determining whether a writ of certiorari will lie to a decision or judgment of an inferior court, a paramount question for consideration is whether there was exercised a judicial function as distinguished from a ministerial act, for certiorari is available for correction of erroneous judgments in exercise of judicial powers, but ordinarily is not a

Decisions Subject to Review by Certiorari (Cont'd)

proper remedy to correct errors relating to ministerial acts. *Hayes v. Brown*, 205 Ga. 234, 52 S.E.2d 862 (1949).

Writ of certiorari lies to correct errors or restrain excesses of jurisdiction of inferior courts and officers acting judicially only; it will, therefore, not be issued to officers whose functions and duties are ministerial, executive or legislative and not judicial. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Review of a recorder's court decision lies in the superior court by writ of certiorari. *McMillian v. City of Rockmart*, 653 F.2d 907 (5th Cir. 1981).

What Is Judicial Action

1. In General

What is judicial action. — Judicial action is an adjudication upon rights of parties who in general appear or are brought before tribunal by notice or process, and upon whose claims some decision or judgment is rendered; it implies impartiality, disinterestedness, a weighing of adverse claims, and is inconsistent with discretion on one hand — for tribunal must decide according to law and rights of parties — or with dictation on the other; for in first instance it must exercise its own judgment under the law, and not act under a mandate from another power. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Character of action determinative. — Character of action in a given case must decide whether that action is judicial, ministerial, or legislative, or whether it be simply that of a public agent of the county or state, as in its varied jurisdiction it may by turns be each. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Test in determining whether proceeding is judicial. — In determining whether proceeding is judicial in character, question hinges not on whether parties at interest

were in fact given opportunity to be heard, but test is whether parties at interest had right under law to demand trial in accordance with judicial procedures. *South View Cem. Ass'n v. Hailey*, 199 Ga. 478, 34 S.E.2d 863 (1945); *What It Is, Inc. v. Jackson*, 146 Ga. App. 574, 246 S.E.2d 693, cert. denied, 242 Ga. 204, 249 S.E.2d 614 (1978).

Effect of fact that tribunal could have acted nonjudicially. — If a person or tribunal has right under proper delegated authority to act in judicial capacity, character of such judicial procedure, when had as prescribed, is not impaired because under the law such tribunal might have had alternative right to act ex parte without trial, but refused to exercise such right. *South View Cem. Ass'n v. Hailey*, 199 Ga. 478, 34 S.E.2d 863 (1945).

Fact of trial where none is authorized by statute. — Statute giving county commissioners in certain counties power to grant or refuse permission to establish cemeteries outside limits of incorporated towns does not confer upon such commission the duties and functions of a court, so that writ of certiorari might issue from its action taken upon any such application; rather the commission's action is merely entertainment and refusal of a request pertaining to executive duties of commissioners, and fact that there is a trial, where none is authorized under statute, does not operate to change nature and character of procedure. *South View Cem. Ass'n v. Hailey*, 199 Ga. 478, 34 S.E.2d 863 (1945).

Exercise of discretion does not render action taken judicial. — Fact that public agent exercises judgment or discretion in performance of duties does not make his action or functions judicial. *Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n*, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Distinction between judicial and quasi-judicial action. — Performance of judicial acts under authority conferred upon courts is judicial in character, while performance of judicial acts under authority conferred upon other persons, boards, or tribunals is quasi-judicial. *South View Cem. Ass'n v. Hailey*, 199 Ga. 478, 34 S.E.2d 863 (1945).

Basic distinction between administrative and judicial act by officers other than judges is that a quasi-judicial action, contrary to an

administrative function, is one in which all parties are as a matter of right entitled to notice and to a hearing, with opportunity afforded to present evidence under judicial forms of procedure; and that no one deprived of such rights is bound by action taken. *South View Cem. Ass'n v. Hailey*, 199 Ga. 478, 34 S.E.2d 863 (1945).

Chief distinction between legislative and judicial function is that former sets up rights or inhibitions, usually general in character; while latter interprets, applies, and enforces existing law as related to subsequent acts of persons amenable thereto. *South View Cem. Ass'n v. Hailey*, 199 Ga. 478, 34 S.E.2d 863 (1945).

2. Application

Decisions of trial judge of municipal court of Atlanta. — Certiorari to superior court lies from decisions of trial judge of municipal court of Atlanta, Fulton section, for party who wishes to complain of judgment, order or ruling. *Gavant v. Berger*, 182 Ga. 277, 185 S.E. 506, answer conformed to, 53 Ga. App. 304, 185 S.E. 726 (1936); *Wrenn v. Bowden*, 56 Ga. App. 713, 193 S.E. 456 (1937).

Probate judge's refusal to entertain petition to commit incompetent veteran. — Refusal of court of ordinary (now probate court) to entertain jurisdiction of petition to commit incompetent World War I veteran to a United States hospital, is not reviewable by mandamus; certiorari is the appropriate remedy by which said judgment should be reviewed. *Cheek v. Eve*, 182 Ga. 30, 184 S.E. 700 (1936).

Decision, after trial, by governing body that alleged acts constitute nuisance. — A decision by governing body of municipality as to whether alleged acts constitute a nuisance in violation of city ordinance, and whether they should be abated as provided by other city ordinances, made after trial in which parties at interest participated, is a judicial determination from which certiorari lies, and not an exercise of mere legislative, executive or ministerial functions. *City of Cedartown v. Pickett*, 193 Ga. 840, 20 S.E.2d 263 (1942).

Trial and conviction of policeman for conduct unbecoming an officer. — Trial and conviction of policeman, pursuant to city ordinance, on charges of conduct unbecoming an officer and violation of police depart-

ment rule, is a judicial proceeding from final judgment in which writ of certiorari will lie. *Heath v. City of Atlanta*, 67 Ga. App. 85, 19 S.E.2d 746 (1942).

Revocation of certificate by Board for Examination, Qualification and Registration of Architects is a judicial act and certiorari to superior court is available. *Beckanstin v. Dougherty County Council of Architects*, 215 Ga. 543, 111 S.E.2d 361 (1959).

Proceedings before civil service board of county are quasi-judicial in character. Since board therefore exercises judicial powers, writ of certiorari lies for correction of errors committed by it. *Thompson v. Dunn*, 102 Ga. App. 164, 115 S.E.2d 754 (1960).

Adverse decisions of city personnel boards regarding discharge. — Discharged employees of city who are authorized to appeal their discharge to personnel board of city, are entitled to petition superior court for writ of certiorari from adverse decision of personnel board. *Willis v. Jackson*, 148 Ga. App. 432, 251 S.E.2d 341 (1978).

Decisions rendered by county boards of education. — A county board of education is at times a court of limited jurisdiction, and its decisions rendered in this sphere are judicial in nature, and are therefore reviewable by writ of certiorari. *Fuller v. Williams*, 150 Ga. App. 730, 258 S.E.2d 538, rev'd on other grounds, 244 Ga. 846, 262 S.E.2d 135 (1979).

Board of trustees of Employees' Retirement System of Georgia is not a judicial body within meaning of section. *Cantrell v. Board of Trustees of Employees' Retirement Sys.*, 135 Ga. App. 445, 218 S.E.2d 97 (1975), aff'd, 237 Ga. 287, 227 S.E.2d 379 (1976).

Decision of county board of zoning appeals denying variance. — Decision of county board of zoning appeals denying application for variance is neither legislative nor judicial, but is administrative; denial of application for variance not being a judicial decision, certiorari is not applicable. *International Funeral Servs., Inc. v. DeKalb County*, 244 Ga. 707, 261 S.E.2d 625 (1979).

County authorities' order to sheriff to take charge of room in courthouse. — Action of county authorities in ordering sheriff to take charge of room in courthouse occupied by justice of peace was mere exercise of administrative power, and possessed no such attribute of judicial function as to permit

What Is Judicial Action (Cont'd)**2. Application (Cont'd)**

certiorari therefrom under this section. *McDonald v. Marshall*, 185 Ga. 438, 195 S.E. 571 (1938).

Ruling of city council upholding the suspension of police officer was judicatory act, and certiorari would lie to review the ruling. *Raughton v. Town of Fort Oglethorpe*, 177 Ga. App. 171, 338 S.E.2d 754 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 481, 483. 14 Am. Jur. 2d, Certiorari, §§ 1-4. 47 Am. Jur. 2d, Justices of the Peace, § 103.

C.J.S. — 14 C.J.S., Certiorari, §§ 6-25. 24 C.J.S., Criminal Law, § 1665 et seq. 51 C.J.S., Justices of the Peace, §§ 262-266.

ALR. — Payment of fine, serving sentence, or discharge on habeas corpus, as waiver of right to review conviction, 18 ALR 867; 74 ALR 638.

Propriety of certiorari to review decisions of tax boards, 77 ALR 1357.

Propriety of certiorari to review decisions of public officer or board granting, denying, or revoking permit, certificate, or license required as condition of exercise of particular right or privilege, 102 ALR 534.

Availability of remedies other than direct appeal from or error to federal court under provision of federal statute denying appeal or writ of error from decision remanding to state court case removed to federal court, 114 ALR 1476.

Ruling against defendant's attack upon indictment or information as subject to review by higher court, before trial, 133 ALR 934.

Legislature's express denial of right of appeal as affecting right to review on the merits by certiorari or mandamus, 174 ALR 194.

Right of prosecution to writ of certiorari in criminal case, 91 ALR2d 1095.

5-4-2. Petition for certiorari to probate judge generally.

When either party in any case in any probate court lodges objections to any proceeding or decision in the case, affecting the real merits of the case, the party making the same shall offer the objections in writing, which shall be signed by himself or his attorney and, if the same are overruled by the court, the party may petition the superior court for a writ of certiorari, in which petition he shall plainly, fully, and distinctly set forth the errors complained of. If the court deems the objections to be sufficient, it shall forthwith issue a writ of certiorari, directed to the judge of the probate court, requiring him to certify and send up to the superior court, at the time specified in the writ, all the proceedings in the case. (Laws 1799, Cobb's 1851 Digest, p. 523; Code 1863, § 3958; Code 1868, § 3978; Code 1873, § 4050; Code 1882, § 4050; Civil Code 1895, § 4635; Civil Code 1910, § 5181; Code 1933, § 19-201.)

JUDICIAL DECISIONS

Section to be strictly construed. — This section is construed strictly because it is in derogation of common law. *Walden v. John D. Archbold Mem. Hosp.*, 197 Ga. App. 275, 398 S.E.2d 271 (1990).

Certiorari lies only as to issues raised in trial court. — Error which may be corrected by writ of certiorari is one made by tribunal whose judgment is being reviewed because of such error. Where it does not appear from

record that issue was made in trial court, it cannot be raised for first time by certiorari in superior court and reviewed in the Supreme Court. *Smith v. Mayor of Macon*, 202 Ga. 68, 42 S.E.2d 128, answer conformed to, 75 Ga. App. 136, 42 S.E.2d 569 (1947).

Constitutional question may not be raised for first time in petition for writ of certiorari. *Smith v. Mayor of Macon*, 202 Ga. 68, 42 S.E.2d 128, answer conformed to, 75 Ga. App. 136, 42 S.E.2d 569 (1947).

Certiorari is a proper but not exclusive remedy, in a proper case, to correct error in decision of court of ordinary (now probate court). *Stephens v. Bell*, 41 Ga. App. 353, 153 S.E. 99 (1930).

Void judgments may be set aside only by certiorari proceedings. *Latimer v. Burtz*, 28 Ga. App. 691, 112 S.E. 912 (1922).

Special assignment of error necessary. — No questions are presented for review under section unless raised by special assignment of error. *Huson v. Farmer*, 53 Ga. App. 131, 185 S.E. 119 (1936).

Written exceptions to decision of court of ordinary (now probate court) are necessary for certiorari. *Morris v. Morris*, 74 Ga. 826 (1885); *Burdett v. Burdett*, 130 Ga. 514, 61 S.E. 121 (1908).

Noncompliance with requirements as to setting forth errors. — Noncompliance with requirements of setting forth "plainly and distinctly the error complained of," and failure to set forth grounds of motion for new trial or attach them to petition as an exhibit, is ground for dismissal. *East River Nat'l Bank v. Ellman*, 36 Ga. App. 263, 136 S.E. 799 (1927).

Section inapplicable to decisions of ordinary (now judge of probate court) not sitting as a court; in such case, § 5-4-3 applies. *Fortson v. Mattox*, 67 Ga. 282 (1881); *Davis v. James*, 145 Ga. 325, 89 S.E. 203 (1916).

Section inapplicable to wrongful death action. — This section does not encompass the maintenance of a wrongful death action by the siblings of a decedent. *Walden v. John D. Archbold Mem. Hosp.*, 197 Ga. App. 275, 398 S.E.2d 271 (1990).

Remedy for decision concerning homestead. — Unless provision is made for appeal, remedy of leasing party to complain of any error in judgment of ordinary (now judge of probate court) in setting apart or in refusing to set apart homestead, is by certio-

rari. *Cunningham v. United States Sav. & Loan Co.*, 109 Ga. 616, 34 S.E. 1024 (1900); *Fontano v. Mozley & Co.*, 121 Ga. 46, 48 S.E. 707 (1904).

Grant of temporary letters of administration. — Certiorari will lie to correct error of ordinary (now judge of probate court) who, in term time, on contest with parties before him, grants letters of administration pendente lite. *Redd v. Dure*, 40 Ga. 389 (1869).

Where motion to dismiss is improperly sustained. — Where demurrer (now motion to dismiss) to application to set aside fraudulent discharge granted an administrator is improperly sustained, writ of certiorari lies to correct such judgment. *Seagraves v. W.E. Powell Co.*, 143 Ga. 752, 85 S.E. 760 (1915).

Probate judge's refusal to entertain petition to commit incompetent veteran. — Refusal of court of ordinary (now probate court) to entertain jurisdiction of petition to commit incompetent World War I veteran to a United States hospital, is not reviewable by mandamus; certiorari is appropriate remedy by which said judgment should be reviewed. *Cheek v. Eve*, 182 Ga. 30, 184 S.E. 700 (1936).

Correction of erroneous fact statements in exception. — Party excepting to judgment of ordinary (now judge of probate court) is entitled to have pointed out to him the alleged incorrect statement of fact in exceptions and to have opportunity to correct same or compel decision on exceptions as they stand, if exceptor is correct in his contention that exceptions state facts. *Guest v. Rucker*, 77 Ga. App. 696, 49 S.E.2d 687 (1948).

Probate judge's refusal to certify exceptions due to misstated facts. — Where distributee and creditor cite administrator for settlement and, after judgment in case, file exception to judgment with ordinary (now judge of probate court), refusal of ordinary to certify to exceptions for reason that facts set out in exceptions are not true, is not such a judgment overruling exceptions as to be basis for petition for writ of certiorari. *Guest v. Rucker*, 77 Ga. App. 696, 49 S.E.2d 687 (1948).

Cited in *Barrett v. Jackson*, 38 Ga. 181 (1868); *Logan v. State*, 56 Ga. App. 460, 192 S.E. 839 (1937); *Head v. Waldrup*, 193 Ga. 165, 17 S.E.2d 585 (1941); *Brockett v. Max-*

well, 73 Ga. App. 663, 38 S.E.2d 176 (1946); Gray v. Gunby, 206 Ga. 63, 55 S.E.2d 588 (1949); Miller v. Miller, 96 Ga. App. 469, 100

S.E.2d 594 (1957); Georgia Farm Bureau Mut. Ins. Co. v. DeKalb County, 167 Ga. App. 577, 306 S.E.2d 924 (1983).

OPINIONS OF THE ATTORNEY GENERAL

Procedure. — Certiorari is a proper procedure, upon election, for a defendant dissatisfied with the rulings of the probate court and, in response to the writ of certio-

rari, when issued by the superior court, the probate judge must certify and send to the superior court the entire record of the case. 1986 Op. Att'y Gen. No. U86-13.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 139-144, 417-463. 14 Am. Jur. 2d, Certiorari, §§ 5-10.

ALR. — Certiorari after judgment to test

sufficiency of indictment or information as regards the offense sought to be charged, 150 ALR 743.

5-4-3. Petition for certiorari to inferior judicatories generally.

When either party in any case in any inferior judicatory or before any person exercising judicial powers is dissatisfied with the decision or judgment in the case, the party may apply for and obtain a writ of certiorari by petition to the superior court for the county in which the case was tried, in which petition he shall plainly and distinctly set forth the errors complained of. On the filing of the petition in the office of the clerk of the superior court, with the sanction of the appropriate judge endorsed thereon, together with the bond or affidavit, as provided in Code Section 5-4-5, it shall be the duty of the clerk to issue a writ of certiorari, directed to the tribunal or person whose decision or judgment is the subject matter of complaint, requiring the tribunal or person to certify and send up all the proceedings in the case to the superior court, as directed in the writ of certiorari. (Laws 1850, Cobb's 1851 Digest, p. 529; Code 1863, § 3960; Code 1868, § 3980; Code 1873, § 4052; Ga. L. 1878-79, p. 153, § 7; Code 1882, § 4052; Civil Code 1895, § 4637; Civil Code 1910, § 5183; Code 1933, § 19-203.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

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DECISIONS FROM WHICH CERTIORARI IS AVAILABLE

1. IN GENERAL
2. APPLICATION

PETITION FOR CERTIORARI

1. IN GENERAL
2. SUFFICIENCY OF ASSIGNMENT OF ERROR

General Consideration

Right of certiorari is a constitutional right, and may be used to review any judgment of an inferior judiciary. *Young v. Broyles*, 16 Ga. App. 356, 85 S.E. 366 (1915).

Right of certiorari, if pursued in due time, is unaffected by occurrences in lower court. *Young v. Broyles*, 16 Ga. App. 356, 85 S.E. 366 (1915).

Right of certiorari may be exercised without moving for new trial in trial court. *Young v. Broyles*, 16 Ga. App. 356, 85 S.E. 366 (1915).

Each party may have writ in his own favor in same cause, and pendency of first writ sued out is no ground for dismissing second. *Cunningham v. Elliott*, 92 Ga. 159, 18 S.E. 365 (1893).

Writ of certiorari as full and adequate remedy at law. — Writ of certiorari ordinarily furnishes a full and adequate remedy at law for correction of errors in decisions by municipal corporations, courts or councils, rendered in exercise of judicial powers; so that even though a property right may be primarily involved in such manner as would authorize injured party to resort to equity, he is not entitled to claim such relief, where he has already appeared before municipal judiciary, and that body has rendered an adverse decision. *Ballard v. Mayor of Carrollton*, 194 Ga. 489, 22 S.E.2d 81 (1942).

Absent sanction by judge, clerk is unauthorized to file application or issue writ of certiorari. *Bellew v. State Hwy. Dep't*, 127 Ga. App. 301, 193 S.E.2d 202 (1972).

Plaintiff may obtain order directing clerk to issue writ. — If clerk fails to issue writ of certiorari before term to which it is returnable, plaintiff may, if there has been no laches on his part, move court for order directing clerk to issue writ. Without such order, clerk has no authority to issue writ of certiorari subsequently to term to which it was originally returnable, and motion to dismiss will be sustained if he attempts to do so. *Walea v. State*, 121 Ga. 585, 49 S.E. 710 (1905).

Where first petition is sanctioned, but not filed with clerk. — Where petition for certiorari to review judgment of justice of peace was sanctioned, but was never filed in office of clerk of superior court, petition was a mere nullity; and second petition for certiorari in same case, presented to judge of

superior court within 30 days from date of judgment complained of, is not subject to dismissal on ground that petitioner has no legal right to present second petition for certiorari in same case. *Weaver v. Moss*, 71 Ga. App. 329, 30 S.E.2d 779 (1944).

Factual statements of justice of peace, in answer to writ of certiorari presumed true until traversed. *Shelton v. Doster*, 99 Ga. App. 863, 109 S.E.2d 862 (1959).

Magistrate's return failing to send up proceedings. — Magistrate's return is incomplete, where it fails to certify and send up any proceedings in case. *Hardy v. Hardy*, 2 Ga. App. 530, 58 S.E. 779 (1907).

An assignment of error that this duty was not complied with must be sustained. *Stoufer v. Missenheimer*, 26 Ga. App. 554, 106 S.E. 560 (1921), later appeal, 28 Ga. App. 350, 111 S.E. 692 (1922).

Failure of justice of peace to send up copies of proceedings in his court when they are necessary to determination of cause is good ground for dismissal of certiorari; certiorari will not be dismissed because magistrate fails to send up copies of proceedings when errors complained of in petition as verified by answer can be fully considered and determined without reference to such proceedings. *Lynn v. Crapps*, 47 Ga. App. 744, 171 S.E. 398 (1933).

Where the magistrate has failed to certify and send up proceedings in the case, assignment of error that duty was not complied with must be sustained. *Stoufer v. Missenheimer*, 26 Ga. App. 554, 106 S.E. 560 (1921), later appeal, 28 Ga. App. 350, 111 S.E. 692 (1922).

Remedy to review superior court judge's refusal to sanction petition for certiorari is by writ of error to proper appellate court and not by petition to appellate court for mandamus to compel judge to sanction petition. *Jones v. Anderson*, 106 Ga. App. 590, 127 S.E.2d 719 (1962).

Denial of writ improper. — Since the municipal court did not inquire into the defendant's understanding of the nature of the violation to which he confessed guilt, and the record likewise did not show any factual basis for the plea independent of such an inquiry, the superior court erred in denying writ of certiorari. *Brownlee v. City of Atlanta*, 212 Ga. App. 174, 441 S.E.2d 492 (1994).

General Consideration (Cont'd)

Cited in *McCardle v. Fogarty*, 41 Ga. 626 (1871); *Western & Atl. R.R. v. Jackson*, 81 Ga. 478, 8 S.E. 209 (1888); *Dixon v. State*, 121 Ga. 346, 49 S.E. 311 (1904); *Smith v. Marshall*, 127 Ga. 374, 56 S.E. 416 (1907); *Sapp v. Parrish*, 3 Ga. App. 234, 59 S.E. 821 (1907); *Thrasher v. Town of Center*, 8 Ga. App. 391, 69 S.E. 36 (1910); *Johnston v. Brenau College-Conservatory*, 146 Ga. 182, 91 S.E. 85 (1916); *Lowenstein v. Johnston*, 23 Ga. App. 261, 98 S.E. 111 (1919); *Partee v. Peters*, 33 Ga. App. 694, 127 S.E. 660 (1925); *Thompson v. Savannah Bank & Trust Co.*, 39 Ga. App. 809, 148 S.E. 621 (1929); *O'Neal v. Lide*, 45 Ga. App. 235, 164 S.E. 110 (1932); *Statham v. State*, 50 Ga. App. 165, 177 S.E. 522 (1934); *Raley v. Board of Civil Serv. Comm'n*, 61 Ga. App. 152, 5 S.E.2d 918 (1939); *Cowart v. State*, 62 Ga. App. 559, 8 S.E.2d 729 (1940); *Butler v. City of Dublin*, 191 Ga. 551, 13 S.E.2d 362 (1941); *Lewenstein v. Curry*, 75 Ga. App. 22, 42 S.E.2d 158 (1947); *Titshaw v. Rushton*, 83 Ga. App. 685, 64 S.E.2d 473 (1951); *Beckerman v. City of Claxton*, 92 Ga. App. 670, 89 S.E.2d 557 (1955); *Morman v. Pritchard*, 108 Ga. App. 247, 132 S.E.2d 561 (1963); *Murdock v. Perkins*, 219 Ga. 756, 135 S.E.2d 869 (1964); *Manning v. A.A.B. Corp.*, 223 Ga. 111, 153 S.E.2d 561 (1967); *Berry v. Consumer Credit*, 124 Ga. App. 586, 184 S.E.2d 694 (1971); *Sonesta Int'l Hotels Corp. v. Colony Square Co.*, 482 F.2d 281 (5th Cir. 1973); *Goldstein v. Smith*, 141 Ga. App. 493, 233 S.E.2d 864 (1977); *International Funeral Servs., Inc. v. DeKalb County*, 244 Ga. 707, 261 S.E.2d 625 (1979); *Henson v. DeKalb County*, 158 Ga. App. 348, 280 S.E.2d 393 (1981); *Attwell v. Sears Roebuck & Co.*, 159 Ga. App. 811, 285 S.E.2d 199 (1981); *Kariuki v. DeKalb County*, 253 Ga. 713, 324 S.E.2d 450 (1985); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985); *Copeland v. White*, 178 Ga. App. 644, 344 S.E.2d 436 (1986); *Fisher v. City of Atlanta*, 212 Ga. App. 635, 442 S.E.2d 762 (1994).

Bond

Issuance of writ in criminal case from city court. — Bond not prerequisite to issuance of writ of certiorari in criminal case from city court. *Malone v. State*, 27 Ga. App. 53, 107 S.E. 358 (1921).

Application for writ of certiorari to correct errors alleged to have been committed in criminal court of Atlanta, need not be accompanied by bond conditioned for appearance of accused to answer and abide final order, sentence, and judgment of court. *Laws v. State*, 15 Ga. App. 361, 83 S.E. 279 (1914).

Bond as condition precedent to review by certiorari of recorder's court conviction. — Filing of bond or pauper's affidavit provided for under § 5-4-20 is condition precedent to application for certiorari to review judgment of conviction in recorder's court. *West v. City of College Park*, 116 Ga. App. 355, 157 S.E.2d 491 (1967).

Decisions from Which Certiorari Is Available

1. In General

Decisions of municipal corporations, courts or councils rendered in judicial capacity. — Writ of certiorari lies for correction of errors in decisions by municipal corporations, courts or councils, like other inferior judicatures, when rendered in exercise of their judicial powers. *City of Cedartown v. Pickett*, 193 Ga. 840, 20 S.E.2d 263 (1942); *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), *aff'd*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Exercises of legislative, executive or ministerial functions. — Certiorari is not an appropriate remedy to review or obtain relief from judgment, decision or action of inferior judicature or body rendered in exercise of legislative, executive or ministerial functions. *City of Cedartown v. Pickett*, 193 Ga. 840, 20 S.E.2d 263 (1942); *Presnell v. McCollum*, 112 Ga. App. 579, 145 S.E.2d 770 (1965); *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), *aff'd*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

In determining whether a writ of certiorari will lie to a decision or judgment of an inferior court, a paramount question for consideration is whether there was exercised a judicial function as distinguished from a ministerial act, for certiorari is available for correction of erroneous judgments in exercise of judicial powers, but ordinarily is not a proper remedy to correct errors relating to

ministerial acts. *Hayes v. Brown*, 205 Ga. 234, 52 S.E.2d 862 (1949).

Certiorari lies only as to issues raised in trial court. — Error which may be corrected by writ of certiorari is one made by tribunal whose judgment is being reviewed because of such error. Where it does not appear from record that issue was made in trial court, it cannot be raised for first time by certiorari in superior court and reviewed in the Supreme Court. *Smith v. Mayor of Macon*, 202 Ga. 68, 42 S.E.2d 128, answer conformed to, 75 Ga. App. 136, 42 S.E.2d 569 (1947).

Final determination required. — An appeal to the superior court from an order of the city courts may be taken only by petition for certiorari pursuant to this Code section, and only from a "decision or judgment." The writ of certiorari does not lie to correct a judgment of an inferior judicatory until after a final determination of the case. *Jenga v. Deveau*, 193 Ga. App. 436, 388 S.E.2d 361 (1989).

Certiorari will not lie to correct void judgment. *McDonald v. Farmers Supply Co.*, 143 Ga. 552, 85 S.E. 861 (1915); *Gravitt v. Mullins*, 28 Ga. App. 806, 113 S.E. 61 (1922); *Griggs v. City of Macon*, 154 Ga. 519, 114 S.E. 899 (1922).

Party winning his case completely in justice's court is not entitled to writ. *Shope v. Fite & Boston*, 91 Ga. 174, 16 S.E. 990 (1893).

Where there are disputed issues of fact. — Where in trial of case pending in justice's court, there are disputed issues of fact, judgment rendered by magistrate cannot be directly reviewed by writ of certiorari, but there must be appeal, either to jury in that court or to superior court. *Story v. Printup*, 52 Ga. App. 818, 184 S.E. 752 (1936).

Where no issue of fact, justice court's judgment is reviewable by certiorari, regardless of amount involved. *Ray v. Rogers*, 58 Ga. App. 804, 200 S.E. 193 (1938).

Availability of certiorari to test sufficiency of evidence to warrant verdicts or judgments. — See *Ray v. Rogers*, 58 Ga. App. 804, 200 S.E. 193 (1938).

Available for decisions of any inferior judicatory. — This section has reference to the correction of errors in cases in which the writ of certiorari lies, and the writ shall apply to persons dissatisfied with the decision or judgment of any inferior judicatory. *Pough v.*

State, 162 Ga. App. 63, 290 S.E.2d 300 (1982).

2. Application

Writ of certiorari lies where motion for new trial is overruled. *Walker v. State*, 8 Ga. App. 214, 68 S.E. 873 (1910).

Certiorari may be used as means of reviewing judgment upon motion for new trial. *Young v. Broyles*, 16 Ga. App. 356, 85 S.E. 366 (1915).

Justice court's dismissal for want of prosecution. — From judgment of justice's court dismissing case for want of prosecution, appeal to jury does not lie. If there is error in judgment, certiorari is remedy to have case reinstated. *Dolvin, Davidson & Co. v. W.W. Stovall Co.*, 8 Ga. App. 37, 68 S.E. 488 (1910).

Certiorari granted from justice court's judgment in suit on unverified open account. *Hardy v. Hardy*, 2 Ga. App. 530, 58 S.E. 779 (1907).

Certiorari granted from justice court's judgment concerning forcible entry and detainer. *Taylor v. Gay*, 20 Ga. 77 (1856); *McDonald v. Cousins*, 23 Ga. 227 (1857).

Certiorari granted from justice court's judgment taxing costs. *Hewett v. Robertson*, 124 Ga. 920, 53 S.E. 456 (1906).

Certiorari granted from justice court's judgment in proceeding to strengthen attachment bond. *Gregory v. Clark*, 73 Ga. 542 (1884).

Juror's names omitted from jury list. — Certiorari from justice court's judgment denied where its jurors' names were omitted from jury list. *Mitchell v. Bradberry*, 76 Ga. 15 (1885).

Certiorari granted from justice court's judgment in suit establishing lost papers. *Humphrey v. Johnston*, 13 Ga. App. 557, 79 S.E. 530 (1913).

Section applicable to certiorari from city courts unless Act creating court provides otherwise. *Miller v. State*, 126 Ga. 558, 55 S.E. 405 (1906); *Malone v. State*, 27 Ga. App. 53, 107 S.E. 358 (1921).

Certiorari to superior court lies from decisions of trial judge of municipal court of Atlanta, Fulton section, for party who wishes to complain of judgment, order or ruling. *Gavant v. Berger*, 182 Ga. 277, 185 S.E. 506, answer conformed to, 53 Ga. App. 304, 185 S.E. 726 (1936).

Decisions from Which Certiorari Is Available (Cont'd)

2. Application (Cont'd)

Writ of certiorari lies from judgment of police court. *Davis v. City of Waycross*, 10 Ga. App. 384, 73 S.E. 556 (1912).

Certiorari unavailable as to magistrate's judgment binding defendant over to answer to criminal offense. *Griggs v. City of Macon*, 154 Ga. 519, 114 S.E. 899 (1922).

Certiorari permitted from decision of ordinary (now judge of probate court) sitting as habeas corpus court. *Chapman v. Woodruff*, 34 Ga. 91 (1864); *Malone v. State*, 27 Ga. App. 53, 107 S.E. 358 (1921).

Certiorari permitted from decision of ordinary (now judge of probate court) under § 44-9-59, governing removal of obstructions on rights-of-way. *Fortson v. Mattox*, 67 Ga. 282 (1881).

Certiorari permitted from decision of mayor and council acting in judicial capacity. *Mayor of Macon v. Shaw*, 16 Ga. 172 (1854); *Carr v. City Council*, 124 Ga. 116, 52 S.E. 300 (1905).

Certiorari permitted from decision of county commissioners ordering opening of private right-of-way. *Leathers v. Furr*, 62 Ga. 421 (1879).

Certiorari not available from ruling of plumbing inspector. *City Council v. Loftis*, 156 Ga. 77, 118 S.E. 666 (1923).

Appeal from decision of recorder's court. — The Recorder's Court of Chatham County is not such a "like court" within the meaning of statute establishing this court's jurisdiction, therefore the proper procedure for appealing from any decision of a recorder's court is by application for a writ of certiorari. *Ferrell v. State*, 160 Ga. App. 881, 289 S.E.2d 3 (1982).

Local constitutional amendment vesting the recorder's court of a county with jurisdiction to take and entertain pleas of guilty in misdemeanor cases does not authorize a direct appeal to the Court of Appeals and the writ of certiorari is still the method of appealing same. *Pough v. State*, 162 Ga. App. 63, 290 S.E.2d 300 (1982).

The proper method for obtaining review of a decision of a recorder's court is either by direct appeal to the superior court, in the case of traffic violations, or by application for certiorari to the superior court. *Franklin v.*

Recorder's Court, 174 Ga. App. 498, 330 S.E.2d 429 (1985).

Hearing before county board of commissioners issuing "order" finding liability for business taxes and directing that a fieri facias be issued for the amount of taxes due does not constitute a decision of an inferior judicatory from which the taxpayer should petition for certiorari in the superior court where the hearing is not transcribed or recorded, but is memorialized only by the minutes of the meeting, the hearing is not conducted in accordance with judicial procedure, and the ordinance in question does not give an appellant as a matter of right a trial in accordance with judicial procedure. Accordingly, declaratory judgment relief is proper. *Georgia Farm Bureau Mut. Ins. Co. v. DeKalb County*, 167 Ga. App. 577, 306 S.E.2d 924 (1983).

Petition for Certiorari

1. In General

Special assignment of error necessary. — No questions are presented for review under section unless raised by special assignment of error. *Huson v. Farmer*, 53 Ga. App. 131, 185 S.E. 119 (1936).

Petition concerning judgment or ruling of court which assigns no error is an absolute nullity. *Clements v. McCormick Harvesting Mach. Co.*, 115 Ga. 851, 42 S.E. 222 (1902); *Green v. Patterson*, 25 Ga. App. 374, 103 S.E. 437 (1920).

Assignments of error in petition for certiorari must be specific, and when based on rulings of trial court must specifically point out reasons why rulings are error. *Grant v. State*, 48 Ga. App. 162, 172 S.E. 89 (1933).

2. Sufficiency of Assignment of Error

Must specify wherein verdict or judgment is erroneous. — Where verdict or judgment is complained of, assignment of error, unless judgment is on demurrer (now motion to dismiss) or similar pleading or on motion for new trial, must specifically point out wherein verdict or judgment is erroneous. *Feckoury v. Maloney*, 40 Ga. App. 157, 149 S.E. 91 (1929).

Mere general averment of error, in connection with which there is no statement or assignment whatever as to how or wherein

rulings complained of were erroneous, presents no case or question for decision by judge of the superior court. *Chan v. Judge*, 36 Ga. App. 13, 134 S.E. 925 (1926); *Davis v. Lee*, 38 Ga. App. 667, 145 S.E. 110 (1928).

Assignments of error must be specific whether contained in bill of exceptions or in petition for certiorari, and, when based upon decision of trial court, must specifically point out reason why decision is error. *Wall v. Hawker Pottery Co.*, 27 Ga. App. 255, 108 S.E. 134 (1921).

Failure to point out error in rulings renders assignment of error insufficient. *Illinois C.R.R. v. Banks*, 31 Ga. App. 756, 122 S.E. 85 (1924).

Petition merely objecting to judgment, without stating reason, is insufficient under section. *Papworth v. City of Fitzgerald*, 111 Ga. 54, 36 S.E. 311 (1900); *Harrell v. City of Quitman*, 17 Ga. App. 299, 86 S.E. 662 (1915).

Assignment of error stating only that judgment is contrary to law is insufficient. *Davis v. Town of Gibson*, 24 Ga. App. 813, 102 S.E. 466 (1920).

General exception to judgment suffices where it is alleged error stems from erroneous antecedent ruling, provided specific assignments of error are made and preserved as to such antecedent rulings. *Louisville & N.R.R. v. Lovelace*, 26 Ga. App. 286, 106 S.E. 6 (1921).

Assignment of error upon jury charge must specify error or state alternate charge. — In petition for certiorari, assignment of error upon excerpt from charge of court presents no question for reviewing court where it is not pointed out wherein excerpt is erroneous, or why it should not have been given, or why different instructions should have been given. *Maner v. State*, 54 Ga. App.

282, 187 S.E. 692 (1936).

Must set forth ordinance allegedly violated or deny its existence. — Petition for certiorari from recorder's court, seeking review by superior court of judgment, is fatally defective where it does not set out copy of ordinance upon which charge or summons is predicated, or else a denial of its existence. *Wright v. City of Atlanta*, 61 Ga. App. 650, 7 S.E.2d 215 (1940).

Petition for certiorari from conviction for violation of municipal ordinance should contain provisions of ordinance. — Where it is sought to review by certiorari a conviction on charge of having violated a municipal ordinance, existence of which is admitted in petition for certiorari, provisions of ordinance should be stated in petition, but it is not necessary that ordinance be literally copied therein. *Childrey v. City of Atlanta*, 62 Ga. App. 107, 7 S.E.2d 919 (1940).

Certification of payment of costs and giving of security need not be attached to petition. — It is not necessary to attach to petition for certiorari a certificate of magistrate that costs have been paid and security given before sanction of petition of judge of superior court can be obtained. *Jones v. Johnson & Ledbetter Constr. Co.*, 185 Ga. 323, 194 S.E. 902 (1938).

Completed transcript of evidence adduced at board of education hearing is not required for certiorari petition under section, although appellant may elect to incorporate it in petition. *Booth v. Ware County Bd. of Educ.*, 223 Ga. 583, 157 S.E.2d 469 (1967).

Assignment of error that judgment complained of is contrary to law, truth, and justice, is insufficient. *Huson v. Farmer*, 53 Ga. App. 131, 185 S.E. 119 (1936).

OPINIONS OF THE ATTORNEY GENERAL

Writ granted only where error complained of is erroneous as a matter of law. — Under this section writ of certiorari may be granted only where the judgment complained of is erroneous as a matter of law, and a petition seeking such writ must set forth legal errors committed in police court or other inferior tribunal and pray their correction by superior court. 1960-61 Op. Att'y Gen. p. 96.

Appeals from a municipal court conviction of a traffic offense may lie in the Court of Appeals or in the superior court depending on the status of the municipal court and the nature of the offense. 1985 Op. Att'y Gen. No. U85-18.

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, §§ 29-45.

C.J.S. — 14 C.J.S., Certiorari, § 30. 51 C.J.S., Justices of the Peace, §§ 262-266.

5-4-4. Petition for certiorari in appeal case tried by jury in justice of the peace court generally.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1878-79, p. 142, § 1; Code 1882, § 4157j; Civil Code 1895, § 4149; Civil Code 1910, § 4749; Code 1933, § 19-204.

5-4-5. Bond and security required; certificate of payment of costs; oath of security; affidavit of indigence.

(a) Before any writ of certiorari shall issue, except as provided in subsection (c) of this Code section, the party applying for the same, his agent, or his attorney shall give bond and good security, conditioned to pay the adverse party in the case the sums sought as an award to be recovered, together with all future costs, and shall also produce a certificate from the officer whose decision or judgment is the subject matter of complaint that all costs which may have accrued on the trial below have been paid. The bond and certificate shall be filed with the petition for certiorari, and security on the bond shall be liable as securities on appeal.

(b) The person authorized to receive bond and security may compel the security tendered to swear upon oath the means by which he can fulfill the bond obligation. Such action shall exonerate from liability the person receiving the bond and security.

(c) If the party applying for the writ of certiorari makes and files with his petition a written affidavit that he is advised and believes that he has good cause for certiorari to the superior court and that because of his indigence he is unable to pay the costs or give security, as the case may be, the affidavit shall in every respect answer instead of the certificate and bond above-mentioned. (Laws 1811, Cobb's 1851 Digest, pp. 523, 524; Code 1863, §§ 3962, 3963, 3964; Code 1868, §§ 3982, 3983, 3984; Code 1873, §§ 4054, 4055, 4056; Code 1882, §§ 4054, 4055, 4056; Civil Code 1895, §§ 4639, 4640, 4641; Ga. L. 1897, p. 33, § 1; Civil Code 1910, §§ 5185, 5186, 5187; Code 1933, §§ 19-206, 19-207, 19-208.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

BOND

1. IN GENERAL
2. EXECUTION AND ATTESTATION
3. APPROVAL

COSTS

1. IN GENERAL
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AFFIDAVIT OF INDIGENCE

1. IN GENERAL
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3. WHO MAY MAKE AFFIDAVIT

General Consideration

Giving bond or making affidavit is condition precedent, in civil case, to issuance of writ. *Page v. White*, 77 Ga. App. 21, 47 S.E.2d 662 (1948).

Filing of bond or making of pauper affidavit is condition precedent to application to superior court for writ of certiorari. *Bickers v. Georgia Real Estate Comm'n*, 89 Ga. App. 815, 81 S.E.2d 535 (1954).

Petition must affirmatively show filing of bond or pauper affidavit and approval of clerk or judge. *Bickers v. Georgia Real Estate Comm'n*, 89 Ga. App. 815, 81 S.E.2d 535 (1954).

Failure to pay costs and give bond, or to make pauper's affidavit renders certiorari void. *Quinn v. O'Neal*, 57 Ga. App. 248, 194 S.E. 911 (1938).

Writ of certiorari in civil case is void where issued before applicant has given bond, or has made and filed affidavit in forma pauperis, in lieu of such bond. *Page v. White*, 77 Ga. App. 21, 47 S.E.2d 662 (1948).

Where it affirmatively appears from petition for certiorari that there was failure to give bond or to make pauper affidavit, such failure renders petition for certiorari void and an absolute nullity, and petition cannot proceed. *Bickers v. Georgia Real Estate Comm'n*, 89 Ga. App. 815, 81 S.E.2d 535 (1954).

Court was correct in dismissing petition for writ of certiorari where it affirmatively appeared from petition that no attempt had been made to comply with requirements of section relative to making of proper bond or execution of proper pauper's affidavit. *Calloway v. Georgia Real Estate Comm'n*, 89 Ga. App. 823, 81 S.E.2d 540 (1954).

Writ of certiorari is void, when same is issued in case where bond required by section, properly approved, has not been given. *Fairfax Loan & Inv. Co. v. Turner*, 49 Ga. App. 300, 175 S.E. 267 (1934).

Certiorari is properly dismissed where

record does not show that bond was filed with petition. *Odom Bros. Co. v. Stovall*, 28 Ga. App. 661, 112 S.E. 907 (1922).

Effect of failure to comply. — Superior court acquires no jurisdiction of case where party fails to comply with section. *Hartsfield Co. v. Luddy*, 45 Ga. App. 507, 165 S.E. 452 (1932).

Certiorari from municipal court proceeding regarding nuisance. — Proceeding in municipal court to determine question of whether nuisance exists is not criminal or quasi criminal in nature since court cannot fine or imprison defendant in error, and bond required for certiorari is that provided for in this section for civil proceedings, and a bond under § 5-4-20 will not suffice. *City of Atlanta v. Pazol*, 95 Ga. App. 598, 98 S.E.2d 216 (1957).

Provisions of section are inapplicable to criminal cases. *Brown v. State*, 124 Ga. 411, 52 S.E. 745 (1905); *Bickers v. Georgia Real Estate Comm'n*, 89 Ga. App. 815, 81 S.E.2d 535 (1954) (decided under former Civil Code 1910, § 4185, now subsection (a) of this section).

Section inapplicable where certiorari is sought for review of conviction for violation of municipal ordinance. *Ellett v. City of College Park*, 233 Ga. 858, 213 S.E.2d 700 (1975) (decided under Code 1933, § 19-206, now subsection (a) of this section).

Cited in *Fuller v. Arnold*, 64 Ga. 599 (1880); *Hendrix & McBurney v. Mason*, 70 Ga. 523 (1883); *Hester v. Keller*, 74 Ga. 369 (1884); *Baker & Lawrence v. McDaniel*, 87 Ga. 18, 13 S.E. 130 (1891); *Mohrman v. City Council*, 103 Ga. 841, 31 S.E. 95 (1898); *New York Life Ins. Co. v. Rhodes*, 4 Ga. App. 25, 60 S.E. 828 (1908); *American Inv. Co. v. Cable Co.*, 4 Ga. App. 106, 60 S.E. 1037 (1908); *Foley & Williams Mfg. Co. v. Bell & Harrell*, 4 Ga. App. 447, 61 S.E. 856 (1908); *Sanford v. Wade*, 17 Ga. App. 366, 86 S.E. 945 (1915); *King v. Gafford*, 43 Ga. App. 452, 159 S.E. 292 (1931); *Howard v. Boone*, 45

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Ga. App. 356, 164 S.E. 470 (1932); Garvin v. Ray, 174 Ga. 905, 164 S.E. 677 (1932); Deep v. De Vane, 49 Ga. App. 323, 175 S.E. 386 (1934); Roberts v. Citizens Bank, 62 Ga. App. 584, 8 S.E.2d 900 (1940); Brooks v. Arline, 68 Ga. App. 791, 24 S.E.2d 230 (1943); Delinski v. Dunn, 206 Ga. 825, 59 S.E.2d 248 (1950); Taylor v. City of Atlanta, 84 Ga. App. 739, 67 S.E.2d 143 (1951); Palmer Tire Co. v. Maxwell Bros. Furn. Co., 99 Ga. App. 87, 107 S.E.2d 695 (1959); Yield, Inc. v. City of Atlanta, 145 Ga. App. 172, 244 S.E.2d 32 (1978).

Bond**1. In General**

Provisions of subsection (a) are mandatory. Bickers v. Georgia Real Estate Comm'n, 89 Ga. App. 815, 81 S.E.2d 535 (1954) (decided under Code 1933, § 19-206, now subsection (a) of this section).

Bond must be given and approved before writ issues. — Writ of certiorari in civil case, unless sued out in forma pauperis, is void if same be issued before applicant has given bond prescribed. Before writ of certiorari can properly issue it must appear from record that it has been duly approved, and to be duly approved it must, among other things, be approved before writ of certiorari issues. Butters Mfg. Co. v. Fraley, 46 Ga. App. 712, 169 S.E. 55 (1933).

Bond is condition precedent to issuance of writ, but not to sanction of petition for certiorari. Smith v. McCranie, 14 Ga. App. 721, 82 S.E. 307 (1914); Gragg Lumber Co. v. Collins, 37 Ga. App. 76, 139 S.E. 84 (1927).

Bond is required where pauper affidavit is not filed. Simon v. Mayor of Savannah, 4 Ga. App. 171, 60 S.E. 1036 (1908); Tuten v. Showalter, 14 Ga. App. 690, 82 S.E. 154 (1914); Belk v. Cannon, 19 Ga. App. 487, 91 S.E. 790 (1917).

Certiorari bond need not be under seal. A.R. King & Co. v. Cantrell, 4 Ga. App. 263, 61 S.E. 144 (1908).

Bond is not void because it includes provision not authorized by section. Scott v. Oxford, 105 Ga. App. 301, 124 S.E.2d 420 (1962).

Bond complying with section need not bind parties to pay stated penal sum. —

Where condition of bond complies with provisions of this section, fact that it does not bind parties to pay stated penal sum does not vitiate it. Bank of Am. Nat'l Trust & Sav. Ass'n v. Reserve Life Ins. Co., 90 Ga. App. 332, 83 S.E.2d 66 (1954).

Bond providing for payment of future costs, but not for recovery sought. — Where plaintiff in certiorari has paid accrued costs and given bond providing for payment of all future costs, but not providing for payment of eventual condemnation money, he has substantially complied with statute. Hartsfield Co. v. Luddy, 45 Ga. App. 507, 165 S.E. 452 (1932).

Bond providing penalty for less than amount sought as award. — Where bond pursuant to section provides for penalty of \$20.00 and \$20.00 is insufficient to meet sum sought as award, bond is insufficient and certiorari should be dismissed. Gullatt v. Blakenship, 42 Ga. App. 139, 155 S.E. 353 (1930).

Party taking bond cannot delegate right under subsection (b) to justification by surety. — Where party taking bond is State Personnel Board, by a majority of its members, nothing in the law gives it the right to delegate its right to justification by surety to any other officer. It alone has power to approve or disapprove bond, and such authority cannot be exercised even by judge of superior court, or by clerk of trial court. Where there is no approval of bond by judicial officer, writ must be dismissed. Scott v. Oxford, 105 Ga. App. 301, 124 S.E.2d 420 (1962).

Best way to show that proper bond has been given is to attach to petition a certified copy of the bond, with certificate of approval by proper officer, and allege affirmatively that bond was given and approved as required by law. Beard v. City of Atlanta, 91 Ga. App. 584, 86 S.E.2d 672 (1955).

Bond filed with first petition does not meet requirements of law as to a second petition. Yield, Inc. v. City of Atlanta, 152 Ga. App. 171, 262 S.E.2d 481 (1979).

Cited in Hamilton & Co. v. Phenix Ins. Co., 107 Ga. 728, 33 S.E. 705 (1899); Hunter v. Lanier, 74 Ga. App. 177, 39 S.E.2d 79 (1946).

2. Execution and Attestation

A certiorari bond may be executed by an agent. Porterfield v. City of La Grange, 60

Ga. App. 646, 4 S.E.2d 732 (1939).

Authority of agent to sign bond will be presumed, unless rebutted. Georgia-Alabama Bus. College v. Constitution Publishing Co., 8 Ga. App. 348, 69 S.E. 34 (1910).

Agent or attorney authorized to represent party in case may give bond. — Bond shall be given by party himself, or by his agent, either general or special, who is authorized to represent party in that particular case, or by attorney whose employment includes services in that case or who is authorized by party to give bond. Alabama M. Ry. v. Stevens, 116 Ga. 790, 43 S.E. 46 (1902).

Bond must be signed by surety. — Where bond given by plaintiff in certiorari was not signed by any person or corporation as surety, the only signature thereto being that of principal (the plaintiff in certiorari), bond given did not meet requirements of section. Gleason v. Burgess, 46 Ga. App. 486, 167 S.E. 916 (1933).

Where agent of surety signs bond, authority must expressly appear. — Where on certiorari from trial court, certiorari bond is signed by one as agent for surety named thereon, authority of such agent must expressly appear. Taylor v. City of Atlanta, 84 Ga. App. 739, 67 S.E.2d 143 (1951); Edwards v. City of Atlanta, 88 Ga. App. 329, 76 S.E.2d 635 (1953).

Where plaintiff sues on non-severable cause of action, both parties must sign bond, absent authority to the contrary. Harwell v. Marshall, 125 Ga. 451, 54 S.E. 93 (1906).

Where corporation is surety, bond signed by its attorney must be accompanied by power of attorney. Hunter v. Lanier, 74 Ga. App. 177, 39 S.E.2d 79 (1946).

Bond for partnership. — Where applicant for writ of certiorari is a partnership and bond required by section is not signed in firm name, nor by one professing to act for it, proceedings are void. Camp, Saunders & Co. v. Bacon Fruit Co., 117 Ga. 149, 43 S.E. 425 (1903).

Commercial notary may attest signatures to certiorari bond. Hendrix & McBurney v. Mason, 70 Ga. 523 (1883).

Any attesting officer may witness a certiorari bond. Southern Ry. v. Oliver, 13 Ga. App. 5, 78 S.E. 684 (1913).

3. Approval

Bond must be approved by judge or justice of court in which case was originally tried. Butters Mfg. Co. v. Fraley, 46 Ga. App. 712, 169 S.E. 55 (1933).

Bond given under section, to render it effectual, must in some manner be approved by judge or justice of court in which case was originally tried. Stover v. Doyle, 114 Ga. 85, 39 S.E. 939 (1901).

Applicability to petitions from appellate division of municipal court of Atlanta. — There being no special provision of law for any different procedure governing manner in which application for issuance of writ of certiorari may be made when directed to presiding judge of appellate division of Municipal Court of Atlanta, the bond required of petitioner in such a case must be properly and duly approved by presiding magistrate as condition precedent to issuing of writ of certiorari. Butters Mfg. Co. v. Fraley, 46 Ga. App. 712, 169 S.E. 55 (1933).

Trial judge must certify that amount of bond is approved and costs have been paid. — Under this section, it is necessary that in all applications for certiorari in civil cases bond be given in amount approved by trial judge and that such judge certify under his own signature that bond has been approved and that costs have been paid; otherwise certiorari is void. Veal v. Eagle Fire Ins. Co., 103 Ga. App. 757, 120 S.E.2d 674 (1961).

Fact of approval of bond given under section, must appear upon papers themselves. State v. Wynne, 4 Ga. App. 719, 62 S.E. 499 (1908).

Approval may appear on face of bond. Dykes v. Twiggs County, 115 Ga. 698, 42 S.E. 36 (1902); Southeastern Mut. Fire Ins. Co. v. Davison, 25 Ga. App. 83, 102 S.E. 460 (1920).

Bond cannot be approved by anyone other than judge or justice of trial court. Southern Ry. v. Oliver, 13 Ga. App. 5, 78 S.E. 684 (1913).

Clerk of court cannot approve bond. Tippins v. De Loach, 9 Ga. App. 362, 71 S.E. 497 (1911).

Approval of bond by clerk, or certification by clerk or other officer that costs have been paid, is insufficient. Veal v. Eagle Fire Ins. Co., 103 Ga. App. 757, 120 S.E.2d 674 (1961).

Bond (Cont'd)**3. Approval (Cont'd)**

Commercial notary public cannot approve bond. Southeastern Mut. Fire Ins. Co. v. Davison, 25 Ga. App. 83, 102 S.E. 460 (1920).

Magistrate's statement that bond and security has been given. — Statement by trial magistrate in his certificate to petition for certiorari, that petitioner has given bond and security as required by law, is not an equivalent, nor a sufficient substitute, for magistrate's approval of certiorari bond. If bond is unapproved at date of its filing with petition, it is insufficient to authorize clerk to issue writ, and no subsequent approval which might be implied from magistrate's certificate or otherwise can cure deficiency. Butters Mfg. Co. v. Fraley, 46 Ga. App. 712, 169 S.E. 55 (1933).

No subsequent action approving or ratifying bond will save certiorari from dismissal. State v. Wynne, 4 Ga. App. 719, 62 S.E. 499 (1908); Butters Mfg. Co. v. Fraley, 46 Ga. App. 712, 169 S.E. 55 (1933).

Costs**1. In General**

Requirement that costs be paid is intended for protection of officers. Johns v. Lewis Drug Co., 120 Ga. 640, 48 S.E. 127 (1904).

Costs must be paid, not merely deposited. Abrahams v. Ryan, 61 Ga. 597 (1878).

Costs include costs accrued on trial resulting in verdict excepted to, but not costs accrued on previous hearings. Johns v. Lewis Drug Co., 120 Ga. 640, 48 S.E. 127 (1904); Standard Gas Prods. Co. v. Vismor, 31 Ga. App. 418, 121 S.E. 854 (1923).

2. Certificate

Writ may be sanctioned, although certificate of payment of costs is not filed. Fuller v. Arnold, 64 Ga. 599 (1880).

Applicability to Municipal Court of Atlanta. — There is nothing in act creating Municipal Court of Atlanta, or in any of the Acts amendatory thereof, which could be taken to change rule with respect to necessity of signing certificate as to costs by officer whose decision is subject-matter of com-

plaint. Thoms v. John R. Thompson Co., 38 Ga. App. 779, 145 S.E. 533 (1928).

No certificate of payment of costs is required in forcible entry and detainer case. Taylor v. Gay, 20 Ga. 77 (1856).

Certificate not required where second writ of certiorari is procured under § 9-2-61, where first writ in same case was dismissed. Standard Gas Prods. Co. v. Vismor, 31 Ga. App. 418, 121 S.E. 854 (1923).

Receipt of costs may satisfy requirement of certificate that costs have been paid. Western & Atl. R.R. v. Carder, 120 Ga. 460, 47 S.E. 930 (1904).

Statements held insufficient. — Statement that all costs but three dollars allowed to garnishee for answering garnishment was insufficient. Buchanan v. Satterwhite, 22 Ga. App. 23, 95 S.E. 309 (1918).

Mere statement that costs of certiorari in municipal court have been paid is insufficient. Osborn v. Osborn, 70 Ga. 716 (1883).

Certificate made by clerk of court is insufficient. Davis v. Joiner, 1 Ga. App. 106, 58 S.E. 62 (1907).

Judge of superior court did not err in dismissing petition for certiorari which was accompanied by certificate as to payment of costs, signed only by deputy clerk of municipal court. Thoms v. John R. Thompson Co., 38 Ga. App. 779, 145 S.E. 533 (1928).

Affidavit of Indigence**1. In General**

Language of subsection (c) is plain and mandatory. Garvin v. Ray, 174 Ga. 905, 164 S.E. 677 (1932); Bickers v. Georgia Real Estate Comm'n, 89 Ga. App. 815, 81 S.E.2d 535 (1954) (decided under former Civil Code 1910, § 4187, and Code 1933, § 19-208, now subsection (c) of this section).

Writ of certiorari may be sanctioned even where improper affidavit has been filed with clerk, but valid writ of certiorari may not issue in such case. Smith v. McCranie, 14 Ga. App. 721, 82 S.E. 307 (1914).

Cited in Le Bron v. Stewart, 26 Ga. App. 133, 105 S.E. 650 (1921); Roberts v. Selman, 34 Ga. App. 171, 128 S.E. 694 (1925).

2. Contents

What must affidavit state. — Affidavit should allege that owing to his poverty

affiant is unable to give required security; merely stating that affiant is unable to give security, as required by law, is not sufficient. *Roberts v. Selman*, 34 Ga. App. 171, 128 S.E. 694 (1925).

Affidavit must state applicant is advised and believes he has good cause. — Where affidavit in lieu of bond does not recite that applicant is advised and believes that he has good cause for certiorari application is not sustainable. *Williams v. Williams*, 117 Ga. App. 161, 159 S.E.2d 456 (1968).

Omission of declaration in pauper affidavit that applicant "is advised" renders affidavit fatally defective. *Garvin v. Ray*, 174 Ga. 905, 164 S.E. 677 (1932).

Affidavit must state affiant is advised and believes he has good cause for certiorari. *Dorsey v. Black*, 55 Ga. 315 (1875); *Belk v. Cannon*, 19 Ga. App. 487, 91 S.E. 790 (1917).

Applicant making affidavit stating only inability to pay costs. — Where applicant for certiorari does not pay costs and give bond with security or make affidavit that owing to his poverty he was unable to pay costs or give security, but makes affidavit only that he is unable to pay costs, judge of superior court may properly dismiss certiorari. *Quinn v.*

O'Neal, 57 Ga. App. 248, 194 S.E. 911 (1938).

Affidavit stating party is unable to pay costs "and" rather than "or" give security is insufficient and writ issued in such case should be dismissed. *Hackett v. Tate*, 18 Ga. App. 453, 89 S.E. 535 (1916).

Writ of certiorari is void where pauper affidavit allowed in lieu of bond uses conjunctive "and;" he is unable to pay costs and give security instead of disjunctive "or," as required by section. *Fairfax Loan & Inv. Co. v. Turner*, 49 Ga. App. 300, 175 S.E. 267 (1934).

3. Who May Make Affidavit

Minor with sufficient discretion may make a pauper affidavit. *Bowers v. Kanaday*, 94 Ga. 209, 21 S.E. 458 (1894).

An agent cannot make a pauper affidavit. *Hadden v. Larned*, 83 Ga. 636, 10 S.E. 278 (1889).

An attorney at law cannot make a pauper affidavit. *Selma, R. & D.R.R. v. Tyson*, 48 Ga. 351 (1873).

Personal affidavit of partner cannot operate in favor of firm. *Marlow & Bro. v. Hughes Lumber Co.*, 92 Ga. 554, 17 S.E. 922 (1893).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, §§ 30, 39-41.

C.J.S. — 14 C.J.S., Certiorari, §§ 49-53.

ALR. — Right to sue or appeal in forma pauperis as dependent on showing of finan-

cial disability of attorney or other nonparty or nonapplicant, 11 ALR2d 607.

What costs or fees are contemplated by statute authorizing proceeding in forma pauperis, 98 ALR2d 292.

5-4-6. Time for application for writ; filing of petition; service of petition and writ.

(a) All writs of certiorari shall be applied for within 30 days after the final determination of the case in which the error is alleged to have been committed. Applications made after 30 days are not timely and shall be dismissed by the court.

(b) The certiorari petition and writ shall be filed in the clerk's office within a reasonable time after sanction by the superior court judge; and a copy shall be served on the respondent, within five days after such filing, by the sheriff or his deputy or by the petitioner or his attorney. A copy of the petition and writ shall also be served on the opposite party or his counsel or other legal representative, in person or by mail; and service shall be shown by acknowledgment or by certificate of the counsel or person perfecting the

service. (Laws 1838, Cobb's 1851 Digest, p. 528; Laws 1850, Cobb's 1851 Digest, p. 529; Ga. L. 1855-56, p. 233, § 16; Ga. L. 1858, p. 88, § 1; Code 1863, §§ 2861, 3965; Code 1868, §§ 2869, 3985; Code 1873, §§ 2920, 4057; Code 1882, §§ 2920, 4057; Ga. L. 1889, p. 84, § 1; Civil Code 1895, §§ 3771, 4642; Civil Code 1910, §§ 4365, 5188; Ga. L. 1924, p. 59, §§ 1, 2; Code 1933, §§ 19-209, 19-210; Ga. L. 1961, p. 190, §§ 2, 3.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TIME FOR FILING APPLICATION

1. IN GENERAL

2. WHAT ARE FINAL JUDGMENTS

NOTICE

General Consideration

Cited in Gregory v. Daniel & Son, 93 Ga. 795, 20 S.E. 656 (1894); Carson v. Mayor of Forsyth, 97 Ga. 258, 22 S.E. 955 (1895); Seagraves v. W.E. Powell Co., 143 Ga. 572, 85 S.E. 760 (1915); Hudson v. State, 21 Ga. App. 507, 94 S.E. 645 (1917); Bull & Son v. Armour Fertilizer Works, 26 Ga. App. 151, 105 S.E. 616 (1921); Johnson v. Barrett, 26 Ga. App. 781, 107 S.E. 168 (1921); Kirkland v. Luke, 30 Ga. App. 203, 117 S.E. 259 (1923); Russell v. Kennington, 160 Ga. 467, 128 S.E. 581 (1925); Towery v. City of McCaysville, 38 Ga. App. 85, 142 S.E. 702 (1928); Jordan v. State, 172 Ga. 857, 159 S.E. 235 (1931); Hudson v. Higgins, 45 Ga. App. 358, 164 S.E. 688 (1932); Nalley & Co. v. Moore, 51 Ga. App. 718, 181 S.E. 429 (1935); Quinn v. O'Neal, 58 Ga. App. 628, 199 S.E. 359 (1938); Howard v. Williams, 72 Ga. App. 822, 35 S.E.2d 389 (1945); Washburn v. Thompson, 78 Ga. App. 133, 50 S.E.2d 761 (1948); Taylor v. Golian Steel & Iron Co., 86 Ga. App. 639, 72 S.E.2d 196 (1952); Bickers v. Georgia Real Estate Comm'n, 89 Ga. App. 815, 81 S.E.2d 535 (1954); Hipp v. City of East Point, 105 Ga. App. 775, 125 S.E.2d 672 (1962); Allison v. City of Atlanta, 109 Ga. App. 114, 135 S.E.2d 524 (1964); Murdock v. Perkins, 219 Ga. 756, 135 S.E.2d 869 (1964); Barrett v. City of Chamblee, 117 Ga. App. 205, 160 S.E.2d 278 (1968); Bellew v. State Hwy. Dep't, 127 Ga. App. 301, 193 S.E.2d 202 (1972); Goldstein v. Smith, 141 Ga. App. 493, 233 S.E.2d 864 (1977); Schaffer v. City of Atlanta, 144 Ga. App. 702, 242 S.E.2d 288 (1978); Williams v. Brownlee, 147 Ga. App.

831, 250 S.E.2d 567 (1978); Fulton County v. Williams, 150 Ga. App. 496, 258 S.E.2d 155 (1979); Mulling v. Wilson, 245 Ga. 773, 267 S.E.2d 212 (1980); Kaplan v. City of Atlanta, 158 Ga. App. 58, 279 S.E.2d 307 (1981); Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981); Georgia Farm Bureau Mut. Ins. Co. v. DeKalb County, 167 Ga. App. 577, 306 S.E.2d 924 (1983).

Time for Filing Application

1. In General

Provisions of subsection (a) are mandatory. — Provisions of section are absolute and mandatory in respect of time within which writs of certiorari shall be applied for, and cannot be varied or departed from in exercise of any judicial discretion. Hitt v. City of Atlanta, 103 Ga. App. 717, 120 S.E.2d 339 (1961).

Application for writ of certiorari must be made within 30 days of final determination of case in inferior court. Eisenberg v. Fuller, 148 Ga. App. 603, 252 S.E.2d 17 (1979).

Petition must be presented within thirty days from rendition of verdict, if it does not complain of error in dismissing motion for new trial. Autrey & Peebles v. Carson Naval Stores Co., 29 Ga. App. 422, 115 S.E. 924 (1923).

Where judgment is not final, subsequent judgments pertaining to it are not final. — Where verdict and judgment rendered in Municipal Court of Atlanta is not a final judgment, neither judgment of trial judge overruling motion for new trial excepting to

such verdict and judgment, nor judgment of appellate division of that court affirming such judgment of trial judge, is a final judgment. *Reed v. V.H. Kriegshaber & Son*, 44 Ga. App. 64, 160 S.E. 560 (1931).

Filing of mandamus action does not excuse compliance with section. — Because certiorari and mandamus are completely different remedies as to subject matter, procedure and nature of relief, filing a mandamus action does not excuse compliance with requirements of this section. *Richardson v. Rector*, 134 Ga. App. 116, 213 S.E.2d 488 (1975).

Section does not deal with means of preserving exceptions to trial court rulings. — This section merely limits time after final judgment in which writ of certiorari may be applied for, but does not attempt to go into manner in which exceptions to orders and rulings prior to final judgment may be preserved. *Taylor v. Golian Steel & Iron Co.*, 86 Ga. App. 639, 72 S.E.2d 196 (1952).

Certiorari from appeals in justice's court are from jury verdict. — It is from verdict of jury in appeal cases in justice's court that certiorari may be taken, not from judgment which justice may enter thereon. *Western & A.R.R. v. Carson*, 70 Ga. 388 (1883).

Fact of timely application must appear from record, unless answer of justice verifies said fact. *Duke v. Story*, 113 Ga. 112, 38 S.E. 337 (1901); *Landrum v. Moss*, 1 Ga. App. 216, 57 S.E. 965 (1907).

Section governs time for second application where first application dismissed for noncompliance. — Where application for certiorari is a nullity, because of failure to comply with requirement as to bond, time within which second application may be made is governed by this section, and is not extended by law as to renewal of cases within six months after dismissal under § 9-2-61. *Tuten v. Showalter*, 14 Ga. App. 690, 82 S.E. 154 (1914); *Autrey & Peebles v. Carson Naval Stores Co.*, 29 Ga. App. 422, 115 S.E. 924 (1923).

Renewal of previously dismissed, but timely certiorari in same cause. — Where certiorari is applied for after expiration of statutory period from date of judgment complained of, petition should show on its face that it is a renewal of a previously dismissed certiorari sued out within proper time in same cause, and that renewal is within six

months from date of dismissal of previous certiorari. Unless all of these facts appear in petition for certiorari, the judge of superior court has no jurisdiction of case, and should refuse to sanction petition; and, if such petition is sanctioned, it should be dismissed when proper motion therefor is made upon hearing of certiorari. *Smith v. City of Atlanta*, 48 Ga. App. 853, 174 S.E. 171 (1934).

Valid writ of error suspends running of time limit for application for writ of certiorari. *Gavant v. Berger*, 51 Ga. App. 628, 181 S.E. 210 (1935).

Eleventh of November, although a legal holiday, is included in computing 30-day period. — In computing 30 days within which petition for certiorari must be presented eleventh of November, although a legal holiday and last day, must be included. *Freeman v. Beneficial Loan Soc'y*, 42 Ga. App. 294, 155 S.E. 786 (1930).

2. What Are Final Judgments

Writ of certiorari lies only after rendition of judgment making final disposition of case, and then only to correct errors which affect such final judgment. It does not lie to correct errors affecting only judgment which is not final. *Reed v. V.H. Kriegshaber & Son*, 44 Ga. App. 64, 160 S.E. 560 (1931).

Writ of certiorari lies only after rendition of final judgment. *Hayes v. Brown*, 205 Ga. 234, 52 S.E.2d 862 (1949).

Final disposition of case in inferior court is prerequisite to writ of certiorari. *Singer Mfg. Co. v. McNeal Paint & Glass Co.*, 117 Ga. 1005, 44 S.E. 801 (1903).

Absent final judgment, court is correct in refusing to act. — Where there has been no final judgment rendered by the state court, the superior court is correct in refusing to exercise its supervisory powers through a writ of certiorari. *Attwell v. Sears Roebuck & Co.*, 159 Ga. App. 811, 285 S.E.2d 199 (1981).

Judgment of justice of peace, refusing to allow amendment to petition is not final determination. *Felker v. Freeman*, 46 Ga. App. 767, 169 S.E. 247 (1933).

Verdict and judgment against special plea of no partnership is not a final judgment. *Reed v. V.H. Kriegshaber & Son*, 44 Ga. App. 64, 160 S.E. 560 (1931).

Judgment sustaining motion to dismiss and granting leave to amend. — is not final

Time for Filing Application (Cont'd)
2. What Are Final Judgments (Cont'd)

judgment, judgment sustaining demurrer (now motion to dismiss) to petition, which grants leave to plaintiff to amend on pain of dismissing suit, is not a final judgment, and certiorari does not lie thereto. *Massengale v. Colonial Hill Co.*, 34 Ga. App. 807, 131 S.E. 299 (1926).

Notice

Editor's notes. — In light of the similarity of the issues dealt with by the provisions, decisions under former Code 1933, § 19-212 are included in the annotations for this Code section.

Service on the opposite party within five days is mandatory and in the absence of such service the application for certiorari is properly dismissed. *City of Atlanta v. Saunders*, 159 Ga. App. 566, 284 S.E.2d 77 (1981).

Provisions for notice to opposite party are mandatory. *Glover v. Berry Sch.*, 90 Ga. App. 232, 83 S.E.2d 22 (1954) (decided under former Code 1933, § 19-212).

Notice to opposite party is required unless prevented by unavoidable cause or waived in writing. — Notice to be given to opposite party in interest, his agent, or attorney, unless prevented by unavoidable cause or unless waived in writing, and where such notice is not given and it is not shown to be due to unavoidable cause, certiorari shall be dismissed unless waived in writing. *Attebery v. City of Manchester*, 76 Ga. App. 265, 45 S.E.2d 781 (1947) (decided under former Code 1933, § 19-212).

Failure to serve writ on judge whose decision is to be reviewed. — Where it appears that the writ of certiorari has not been served upon the judge, or other officer whose decision is sought to be reviewed, 15 days previous to the term of court to which the return is to be made, the proceeding should be dismissed, unless it clearly appears that the failure to serve was in no way attributable to the fault of the party making application for the writ. *City of Atlanta v. Saunders*, 159 Ga. App. 566, 284 S.E.2d 77 (1981).

Failure to serve board. — The superior court did not err in dismissing petition for certiorari from a decision of the Atlanta Civil

Service Board, since board was not named as a party as required by subsection (b), and service of the petition on the City of Atlanta was not service on the City of Atlanta Civil Service Board as a matter of law. *Fisher v. City of Atlanta*, 212 Ga. App. 635, 442 S.E.2d 762 (1994).

Section 5-4-10 may not be utilized to permit service beyond time permitted in this section. *City of Atlanta v. Saunders*, 159 Ga. App. 566, 284 S.E.2d 77 (1981).

It is the actual filing of petition in clerk's office which gives it validity, but it cannot have any validity as such unless it is actually filed with custodian upon whom the law casts duty of receiving it. *Hunter v. City of Blue Ridge*, 79 Ga. App. 719, 54 S.E.2d 510 (1949).

Giving of required notice must affirmatively appear from certiorari proceedings. — Where it does not affirmatively appear from certiorari proceedings that required notice or a waiver thereof was given, proceedings are fatally defective, and superior court does not err in overruling and denying petition for certiorari. *Williams v. State*, 91 Ga. App. 124, 85 S.E.2d 91 (1954).

Personal service upon respondent is required by this section. *Gornto v. City of Brunswick*, 119 Ga. App. 673, 168 S.E.2d 323 (1969).

Failure to comply with subsection (b) renders petition and writ invalid. — Where certiorari was dismissed for want of compliance with provisions of section, petition for certiorari and writ of certiorari were invalid, and for this reason there was no case pending which could be recommenced within six months as provided in § 9-2-61. *Butters Mfg. Co. v. Sims*, 47 Ga. App. 648, 171 S.E. 162 (1933) (decided under former Code 1933, § 19-210, prior to amendment by Ga. L. 1961, p. 190, § 3, now embodied in subsection (b) of this section).

Jurisdiction over appeal from dismissal of petition for failure of service. — Where sole question for review on appeal is dismissal of petition for certiorari because of failure of service, the Court of Appeals has jurisdiction of the appeal. *Gornto v. City of Brunswick*, 225 Ga. 128, 166 S.E.2d 349 (1969).

Failure to give notice to opposite party shall be mandatory ground for dismissal of certiorari unless prevented by unavoidable cause, or unless waived. *Glover v. Berry Sch.*,

90 Ga. App. 232, 83 S.E.2d 22 (1954) (decided under former Code 1933, § 19-212).

Failure to give notice to opposite party is fatal to proceedings and subjects them to dismissal at any time before final judgment. *Goldberg v. City of Atlanta*, 71 Ga. App. 269, 30 S.E.2d 661 (1944) (decided under former Code 1933, § 19-212).

Acknowledgment of service does not estop one from claiming service was untimely. — Mere acknowledgment of service of no-

tice of sanction of writ of certiorari does not estop person making acknowledgment from setting up that the same was, under the law relating thereto, served too late. *Scott v. State*, 75 Ga. App. 684, 44 S.E.2d 391 (1947) (decided under former Code 1933, § 19-212).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, §§ 30, 32-38.

C.J.S. — 14 C.J.S., Certiorari, §§ 37-48, 63-72.

ALR. — Applicability of statute of limitations or doctrine of laches to certiorari, 40 ALR2d 1381.

5-4-7. Time for filing of answer; manner of service; effect of failure to perfect service.

The answer to the writ of certiorari shall be filed in the clerk's office within 30 days after service thereof on the respondent unless further time is granted by the superior court. A copy of the answer shall be mailed or delivered to the petitioner by the respondent or by the clerk of the superior court. Failure to perfect service shall be grounds for continuance but shall not otherwise affect the validity of the proceedings. (Orig. Code 1863, § 3969; Code 1868, § 3989; Code 1873, § 4061; Code 1882, § 4061; Civil Code 1895, § 4646; Civil Code 1910, § 5195; Ga. L. 1918, p. 124, §§ 1, 2; Code 1933, § 19-301; Ga. L. 1961, p. 190, § 5.)

JUDICIAL DECISIONS

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CONTENT AND SUFFICIENCY OF ANSWER

General Consideration

Answer provides source of facts of case and rulings for reviewing court. — In certiorari case, answer of trial judge is only source from which knowledge of facts of case and rulings therein can be derived by reviewing court. *Adams v. Bishop*, 46 Ga. App. 32, 166 S.E. 460 (1932).

Only answer of justice embodies and can identify evidence before jury in his court. *Akridge v. Watertown Steam Engine Co.*, 77 Ga. 50 (1886).

If answer is not traversed, it becomes part

of record. *Mossman v. McKinley*, 67 Ga. 391 (1881).

Burden is on applicant to cause timely answer by magistrate. — Burden is on applicant for certiorari to cause magistrate's answer to be filed within 30 days of service upon him. *Schaffer v. City of Atlanta*, 151 Ga. App. 1, 258 S.E.2d 674 (1979), rev'd on other grounds, 245 Ga. 164, 264 S.E.2d 6 (1980).

Petition shall not be dismissed for insufficient affidavit where answer supports petition. — That affidavit in support of petition for certiorari is insufficient is no ground for

General Consideration (Cont'd)

dismissal after certiorari has been answered, if answer supports petition. *Taylor v. Gay*, 20 Ga. 77 (1856).

Dismissal under section due to petitioner's failure to act timely. — Where plaintiff in certiorari is at fault, in failing to make appropriate motion in due time, and dismissal under this section results from this fault, and not from bare failure of judge to file his answer, such dismissal will not be affected by § 5-4-15, which provides that where trial judge dies before making his answer to certiorari filed on him, a new trial will be granted. *Mathis v. City of Nashville*, 49 Ga. App. 309, 175 S.E. 383 (1934).

Cited in *Bunn v. Henderson*, 113 Ga. 609, 39 S.E. 78 (1901); *Daniels v. State*, 118 Ga. 18, 44 S.E. 818 (1903); *Sutton v. State*, 120 Ga. 865, 48 S.E. 342 (1904); *J.M. High Co. v. Georgia Ry. & Power Co.*, 12 Ga. App. 505, 77 S.E. 588 (1913); *Carroll v. Upchurch*, 25 Ga. App. 646, 104 S.E. 16 (1920); *Heinz v. Backus*, 34 Ga. App. 203, 128 S.E. 915 (1925); *Galfas v. City of Atlanta*, 88 Ga. App. 385, 76 S.E.2d 641 (1953); *Allison v. City of Atlanta*, 109 Ga. App. 114, 135 S.E.2d 524 (1964); *Copeland v. White*, 172 Ga. App. 198, 322 S.E.2d 523 (1984).

Content and Sufficiency of Answer

Return or answer must constitute verification or denial, from record or otherwise, of material assertions in petition. *Herault v. Department of Human Resources*, 137 Ga. App. 446, 224 S.E.2d 480 (1976).

Answer should contain evidence in case or adopt statement of evidence contained in petition for certiorari in whole or in part. *Norris v. Sibert & Robinson*, 53 Ga. App. 440, 186 S.E. 199 (1936) (decided under

former Code 1933, § 19-301, as it read prior to amendment by Ga. L. 1961, p. 190, § 5).

Sufficiency of answer is to be determined by whether it sufficiently verifies factual situation upon which alleged errors are predicated. *Herault v. Department of Human Resources*, 137 Ga. App. 446, 224 S.E.2d 480 (1976).

As to answer substantially complying with section, see *Lunsford v. State*, 60 Ga. App. 537, 4 S.E.2d 112 (1939) (decided under former Code 1933, § 19-301, as it read prior to amendment by Ga. L. 1961, p. 190, § 5).

Better practice where trial judge does not care to categorically admit or deny allegations of various paragraphs of petition for certiorari, but desires to stand on stenographic report of proceedings as truth of matters alleged, is in his answer to each paragraph containing allegations as to evidence, objections of counsel, and rulings of the court, to quote pertinent part of report in reference to allegations made in each paragraph, instead of merely admitting allegations except insofar as they may conflict with stenographic report attached. *Lunsford v. State*, 60 Ga. App. 537, 4 S.E.2d 112 (1939) (decided under former Code 1933, § 19-301, as it read prior to amendment by Ga. L. 1961, p. 190, § 5).

Answer from memory will suffice, if testimony was recollected. *Colbert v. State*, 118 Ga. 302, 45 S.E. 403 (1903); *Harris v. Daly*, 121 Ga. 511, 49 S.E. 609 (1904).

Original papers from trial court are not to be sent up on certiorari. *Barfield v. McCombs*, 89 Ga. 799, 15 S.E. 666 (1892).

Certificate of magistrate, required by § 5-4-5 before sanction of certiorari will not operate as answer. *Henry v. American Ry. Express Co.*, 25 Ga. App. 646, 104 S.E. 16 (1920).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 *Am. Jur. 2d*, *Certiorari*, §§ 47-51.

5-4-8. Writing or dictation of answer by parties, attorneys, or interested persons; when verification required.

The answer shall not be written or dictated by either of the parties, or their attorneys, or any other person interested in the merits of the case. If

made after the party making the same has retired from office, it shall be verified by affidavit. (Orig. Code 1863, § 3971; Code 1868, § 3991; Code 1873, § 4063; Code 1882, § 4063; Civil Code 1895, § 4648; Civil Code 1910, § 5197; Code 1933, § 19-303.)

JUDICIAL DECISIONS

First sentence of section is mandatory. Lee v. Continental Cas. Co., 20 Ga. App. 714, 93 S.E. 262 (1917).

Section applies where a second answer is prepared by former counsel in case. Lee v. Continental Cas. Co., 20 Ga. App. 714, 93 S.E. 262 (1917).

Section inapplicable to refusal to answer. Zachery v. State, 106 Ga. 123, 32 S.E. 22 (1898).

Section does not prevent justice from adopting recitals of fact in petition. Davis v. Rhodes, 112 Ga. 106, 37 S.E. 169 (1900).

Retired police justice may perfect answer, although he is assistant city attorney, if not counsel in case. Phillips v. City of Atlanta, 87 Ga. 62, 13 S.E. 201 (1891).

Oral objection may lie to unverified affidavit. Love v. Bush, 21 Ga. App. 436, 94 S.E. 626 (1917).

Cited in Combs v. State, 9 Ga. App. 840, 72 S.E. 284 (1911); Blackwood v. City of Social Circle, 125 Ga. App. 676, 188 S.E.2d 823 (1972).

RESEARCH REFERENCES

C.J.S. — 14 C.J.S., Certiorari, §§ 63-65.

5-4-9. Filing of traverse or exception to answer; perfection of answer.

The petitioner or defendant in certiorari may traverse or except to the answer of the respondent, which exceptions or traverse shall be filed in writing, specifying the defects, within 15 days after the filing of the answer; and, if the traverse or exceptions are sustained, the answer shall be perfected as directed by the court. (Orig. Code 1863, § 3970; Code 1868, § 3990; Code 1873, § 4062; Code 1882, § 4062; Civil Code 1895, § 4647; Civil Code 1910, § 5196; Code 1933, § 19-302; Ga. L. 1961, p. 190, § 6.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DECISIONS PRIOR TO 1961 AMENDMENT

1. IN GENERAL
2. TIMELINESS OF EXCEPTIONS
3. APPLICATION

General Consideration

Distinction between function of exceptions and function of traverse. — Function of exceptions to answer of magistrate to petition for certiorari is to specify defects in such answer, and such exceptions do not take place of traverse to answer whose func-

tion is to controvert truth of facts set forth in answer. West v. State, 103 Ga. App. 71, 118 S.E.2d 491 (1961).

Traverse of answer of trial judge must be verified affidavit. West v. State, 103 Ga. App. 71, 118 S.E.2d 491 (1961).

Absent traverse, answer is conclusive as to

General Consideration (Cont'd)

recital of facts. — Although section does not require that answer be traversed, if no traverse is filed, answer becomes conclusive as to recitals of fact contained therein, and it becomes the record on which superior court is authorized to rule on merits of petition. *Bembry v. Johnson*, 152 Ga. App. 422, 263 S.E.2d 229 (1979).

Upon trial of certiorari where judge's answer to petition is untraversed, judge of superior court must take as true the statement of facts and evidence adduced upon trial of case as contained in answer and in those portions of petition for certiorari verified thereby as true. *West v. State*, 103 Ga. App. 71, 118 S.E.2d 491 (1961).

Although a traverse to an answer is now optional, the recitals of fact contained in the answer are rendered conclusive when neither a traverse nor an exception is filed. This being so, the court is entitled to rely upon the factual recitals of the answer as a part of the record, and to use them as a basis for his findings. *Cox v. City of Lawrenceville*, 168 Ga. App. 119, 308 S.E.2d 224 (1983).

Traverse and exception unnecessary where petition sufficiently establishes error and answer merely denies allegations. — Where facts sufficient to establish error are alleged in petition and inferior court files answer merely denying these allegations, issues are sufficiently developed for superior court review and exception and subsequent traverse to answer are no longer necessary. *Williamson v. City of Tallapoosa*, 238 Ga. 522, 233 S.E.2d 777 (1977).

Cited in *Phillips v. City of Atlanta*, 79 Ga. 510, 4 S.E. 256 (1887); *Daniels v. State*, 118 Ga. 18, 44 S.E. 818 (1903); *Fulton Bag & Cotton Mills v. Booze*, 8 Ga. App. 430, 69 S.E. 494 (1910); *DeBerry v. Spikes*, 188 Ga. 222, 3 S.E.2d 719 (1939); *Lunsford v. State*, 60 Ga. App. 537, 4 S.E.2d 112 (1939); *Boatright v. Moody*, 210 Ga. 80, 77 S.E.2d 529 (1953); *Ross v. City of Lilburn*, 114 Ga. App. 428, 151 S.E.2d 490 (1966); *Davey v. City of Atlanta*, 130 Ga. App. 687, 204 S.E.2d 322 (1974); *Eisenberg v. Fuller*, 148 Ga. App. 603, 252 S.E.2d 17 (1979); *Willis v. Jackson*, 163 Ga. App. 26, 293 S.E.2d 498 (1982).

Decisions Prior to 1961 Amendment

Editor's notes. — The following decisions were rendered under this section as it read

prior to amendment by Ga. L. 1961, p. 190, § 6, which added traverse (previously dealt with under separate section) to its scope as well as a more specific time limit for filing of exceptions and traverse.

1. In General

Section prescribes method for correcting answer which omits evidence adduced upon trial. — If answer is subject to correction because it does not contain evidence adduced upon trial, proper method to make it adequate and complete in that respect is prescribed by this section. *Loomis v. City of Atlanta*, 82 Ga. App. 346, 60 S.E.2d 397 (1950).

Section prescribes exclusive means for perfecting incomplete answer. — Incomplete answer to writ of certiorari can be perfected only by exceptions taken thereto in manner prescribed by section. *Macris v. Tspourses*, 35 Ga. App. 671, 134 S.E. 621 (1926).

Section prescribes only means of perfecting answer and other relief cannot be granted to plaintiff by Supreme Court. *Wyatt v. Turner*, 40 Ga. 36 (1869); *Stoner v. Magins*, 116 Ga. 797, 43 S.E. 45 (1902); *Tyner v. Leake*, 117 Ga. 990, 44 S.E. 812 (1903).

Motion to dismiss answer will not lie to perfect it. *Star Glass Co. v. Longley & Robinson*, 64 Ga. 576 (1880).

Section provides remedy for both parties where answer of magistrate is not specific. *Landrum v. Moss*, 1 Ga. App. 216, 57 S.E. 965 (1907).

Written exceptions. — If defendant in certiorari is dissatisfied with answer, he should file written exceptions thereto. *Lynn v. Crapps*, 47 Ga. App. 744, 171 S.E. 398 (1933).

Answer binds plaintiff in certiorari, even though incomplete and insufficient, unless exceptions are filed in accordance with section. *Norris v. Sibert & Robinson*, 53 Ga. App. 440, 186 S.E. 199 (1936).

Absent proper exceptions or traverse to answer of trial magistrate allegations thereof are conclusive. *Wadsworth v. Olive*, 53 Ga. App. 539, 186 S.E. 590 (1936).

Any party, dissatisfied with an answer to writ of certiorari must in due time either file exceptions thereto, or traverse same, and, failing to do either, is bound by recitals of fact contained in such answer. *Davis v.*

Rhodes, 112 Ga. 106, 37 S.E. 169 (1900).

Absent exceptions, improper answer by trial judge will cause dismissal. — Where there is an improper or incomplete answer by trial judge to petition for certiorari, judge of superior court will not continue hearing on certiorari until answer is perfected and certiorari will be dismissed, unless exceptions thereto have been filed as provided in this section. *Norris v. Sibert & Robinson*, 53 Ga. App. 440, 186 S.E. 199 (1936).

Where answer does not show that final judgment was rendered, judge may dismiss proceeding. *Southern Ry. v. Leggett & Co.*, 117 Ga. 31, 43 S.E. 421 (1903); *Hill v. Anderson Banking Co.*, 18 Ga. App. 41, 88 S.E. 749 (1916).

Exceptions will lie only where omissions are material to proper decision of case. *Hardy v. Hardy*, 2 Ga. App. 530, 58 S.E. 779 (1907).

Where omissions in answer are immaterial to proper decision of case, exceptions will be overruled. *Baird v. Smith*, 124 Ga. 251, 52 S.E. 655 (1905).

2. Timeliness of Exceptions

Exceptions must be filed before hearing. *Bailey v. Ware & Harper*, 17 Ga. App. 492, 87 S.E. 712 (1916), later appeal, 19 Ga. App. 255, 91 S.E. 282 (1917).

Exceptions, if not filed within time prescribed, must be stricken. *Chandler v. Baggett*, 13 Ga. App. 333, 79 S.E. 179 (1913).

Where exceptions are not presented on time by plaintiff, dismissal is proper. *Humphries v. Nalley*, 14 Ga. App. 804, 82 S.E. 357 (1914).

3. Application

Exceptions must specify defects. — They must be so definite, apt, and certain that

magistrate may be able to understand exact nature of deficiency. *Macris v. Tsipourses*, 35 Ga. App. 671, 134 S.E. 621 (1926).

Section does not require that exceptions be verified by affidavit. *Rumph v. Cleveland*, 72 Ga. 189 (1883).

Party may except to judge's failure to send up copy of record. — Where copies of pleading and other part of record are not certified and sent up with answer, it is error to overrule exceptions. *Stouffer v. Missenheimer*, 26 Ga. App. 554, 106 S.E. 560 (1921), later appeal, 28 Ga. App. 350, 111 S.E. 692 (1922).

Failure to attach copy of proceedings, where answer indicates intention to do so. — Where, in certiorari proceeding, record does not show that any copy of proceedings was sent up with answer of trial judge, although statement of judge indicates intention to attach such papers, answer is incomplete in that respect. But if applicant for certiorari desires such information before superior court, it is his duty to except to the answer in order that judge might be required to complete it. *Beavers v. Cassells*, 56 Ga. App. 146, 192 S.E. 249 (1937), aff'd, 186 Ga. 98, 196 S.E. 716 (1938).

Oral objection that answer of retired magistrate is not verified is sustainable. *Love v. Bush*, 21 Ga. App. 436, 94 S.E. 626 (1917).

Additional answer prepared before exceptions to original answer are sustained cannot become part of record, if objected to. *Bailey v. Ware & Harper*, 17 Ga. App. 492, 87 S.E. 712 (1916), later appeal, 19 Ga. App. 255, 91 S.E. 282 (1917).

Where exceptions and traverse are both filed, court should dispose of exceptions first. *Chandler v. Baggett*, 13 Ga. App. 333, 79 S.E. 179 (1913).

5-4-10. Amendment of petition, bond, answer, and traverse.

Certiorari proceedings shall be amendable at any stage, as to matters of form or substance, as to the petition, bond, answer, and traverse; and a valid bond may by amendment be substituted for a void bond or no bond at all. (Code 1933, § 19-403, enacted by Ga. L. 1961, p. 190, § 9.)

JUDICIAL DECISIONS

Purpose of section. — This section has for its obvious purpose the curing of certain procedural defects inherent in former certiorari mechanism by allowing amendments at any stage of appeal. *Scott v. Oxford*, 105 Ga. App. 301, 124 S.E.2d 420 (1962).

Section inapplicable to filing of late answer. — Where motion to dismiss writ of certiorari preceded filing of late answer to petition for writ by respondent judge, dismissal is correct, since section does not apply to filing of a later answer. *Schaffer v. City of Atlanta*, 144 Ga. App. 702, 242 S.E.2d 288

(1978); *City of Atlanta v. Saunders*, 159 Ga. App. 566, 284 S.E.2d 77 (1981).

This section may not be utilized to permit service beyond time permitted in § 5-4-6. *City of Atlanta v. Saunders*, 159 Ga. App. 566, 284 S.E.2d 77 (1981).

Cited in *Morman v. Pritchard*, 108 Ga. App. 247, 132 S.E.2d 561 (1963); *Ellett v. City of College Park*, 233 Ga. 858, 213 S.E.2d 700 (1975); *Yield, Inc. v. City of Atlanta*, 144 Ga. App. 637, 242 S.E.2d 478 (1978); *Willis v. Jackson*, 163 Ga. App. 26, 293 S.E.2d 498 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 36.

C.J.S. — 14 C.J.S., Certiorari, §§ 44, 58, 71.

5-4-11. Conduct of hearing generally; trial by jury.

(a) Certiorari cases shall be heard by the court without a jury, in chambers or in open court, upon reasonable notice to the parties, at any time that the matters may be ready for hearing.

(b) Where a traverse to the answer has been filed and jury trial demanded, the matter may be tried at any time a jury is available therefor. (Orig. Code 1863, § 3972; Code 1868, § 3992; Code 1873, § 4064; Code 1882, § 4064; Civil Code 1895, § 4649; Civil Code 1910, § 5198; Code 1933, § 19-401; Ga. L. 1961, p. 190, § 7.)

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 62.

C.J.S. — 14 C.J.S., Certiorari, §§ 85-88.

5-4-12. Grounds of error considered generally; scope of review; technical distinctions abolished.

(a) No ground of error shall be considered which is not distinctly set forth in the petition.

(b) The scope of review shall be limited to all errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence.

(c) All technical distinctions as to what questions will be considered, such as questions concerning judgments absolutely void or assignments of error drawing in question the legal constitution or jurisdiction of the

tribunal below, are abolished. (Orig. Code 1863, § 3973; Code 1868, § 3993; Code 1873, § 4065; Code 1882, § 4065; Civil Code 1895, § 4650; Civil Code 1910, § 5199; Code 1933, § 19-402; Ga. L. 1961, p. 190, § 8.)

JUDICIAL DECISIONS

Section applies where certiorari petition fails to set out all errors of trial court. *Brown v. Alexander*, 112 Ga. 247, 37 S.E. 368 (1900); *Perry v. Brunswick & W. Ry.*, 119 Ga. 819, 47 S.E. 172 (1904).

Issues neither raised at trial nor in certiorari petition. — Writ of certiorari lies only for correction of errors committed in trial court, and no question, unless first raised there, can be considered by superior court or by this court. *Cohen v. Finkovitch*, 40 Ga. App. 94, 149 S.E. 66 (1929).

Where it does not appear from record that certain issues were raised in trial court, they cannot be raised by certiorari in superior court. *Bell v. City of Valdosta*, 47 Ga. App. 808, 171 S.E. 572 (1933).

Question of freight charges not raised in justice's court on trial cannot properly be raised in superior court or Court of Appeals. *Fine & Bro. v. Southern Express Co.*, 10 Ga. App. 161, 73 S.E. 35 (1911).

Issues neither raised at trial nor in certiorari petition cannot be reviewed by Court of Appeals. *Bell v. City of Valdosta*, 47 Ga. App. 808, 171 S.E. 572 (1933).

Where issue not raised in petition for certiorari nor considered by trial court, appellate court is without authority to review it. *Hodnett v. City of Atlanta*, 145 Ga. App. 285, 243 S.E.2d 605 (1978).

Admission of illegal evidence at trial without objection is not ground for certiorari where both parties were represented by counsel. *Cohen v. Finkovitch*, 40 Ga. App. 94, 149 S.E. 66 (1929).

Supreme Court cannot hold dismissal of certiorari improper where petition sets forth no errors. *Richards v. Little*, 88 Ga. 176, 14 S.E. 207 (1891).

Petition must specify ruling complained of to avoid dismissal. — Petition which fails to point out as erroneous any specific ruling of judge who tried case, and which does not complain specifically of any ruling that was made by him during trial, is properly dismissed. *Cohen v. Finkovitch*, 40 Ga. App. 94, 149 S.E. 66 (1929).

Petition must allege error specifically and distinctly so that reviewing court may understand grounds relied on. *Lynn v. Crapps*, 47 Ga. App. 744, 171 S.E. 398 (1933).

Petition must state what objection was made at trial. — Alleged error in admitting evidence cannot be considered by superior court where petition for certiorari does not state what, if any, objection was made when evidence was offered. *Cohen v. Finkovitch*, 40 Ga. App. 94, 149 S.E. 66 (1929).

Assignment of error that verdict was contrary to or unsupported by evidence is sufficient. *Gresham v. Lee*, 28 Ga. App. 576, 112 S.E. 524 (1922).

Assignment of error that verdict is contrary to law, truth, and justice is insufficient and dismissal is proper. *Taft Co. v. Smith*, 112 Ga. 196, 37 S.E. 424 (1900); *Callaway v. City of Atlanta*, 6 Ga. App. 354, 64 S.E. 1105 (1909); *Huson v. Farmer*, 53 Ga. App. 131, 185 S.E. 119 (1936).

Where only error assigned is that dismissal below was erroneous, dismissal of petition will result. *Hicks v. Smith*, 28 Ga. App. 594, 112 S.E. 295 (1922).

Ground of motion for new trial that verdict is excessive is too general. *Bart v. Scheider*, 39 Ga. App. 467, 147 S.E. 430 (1929).

Overruling certiorari upon legal ground apparent in record. — Section does not preclude judge from overruling certiorari and affirming judgment of trial court upon legal ground apparent in record, without reference to reason given for judgment. *Fowler v. King*, 29 Ga. App. 500, 116 S.E. 54 (1923).

"Substantial evidence" test prescribed. — *Bolton v. City of Newman*, 22 Ga. App. 15, 95 S.E. 472 (1918), which established the "slight evidence" test as a correct test to be used in determining whether the superior court erred in "overruling" a petition for certiorari, is no longer the proper standard to be applied. Subsection (b) prescribes the use of the "substantial evidence" test. *Graham v. Wilkes*, 188 Ga. App. 402, 373 S.E.2d 90 (1988).

Administrative ruling. — The standard of appellate court review of superior court decisions, that of “some” or “any evidence,” is not intended to supervene or diminish the requirement that an administrative ruling be supported by substantial evidence. Wherever evidence before the administrative board is equivocal, the superior court errs in denying certiorari to determine whether the administrative board’s ruling is supported by substantial evidence. *Guntharp v. Cobb County*, 168 Ga. App. 33, 307 S.E.2d 925 (1983).

Decision of city civil service board. — The standard of review which is to be applied to the issues of fact in cases on writ of certiorari to the superior court from city civil service board is whether the judgment or ruling below was sustained by substantial evidence. *Pelis v. LaPorte*, 203 Ga. App. 850, 418 S.E.2d 124 (1992).

Hearing before county board of commissioners issuing “order” finding liability for business taxes and directing that a fieri facias be issued for the amount of taxes due does not constitute a decision of an inferior judicatory from which the taxpayer should petition for certiorari in the superior court

where the hearing is not transcribed or recorded, but is memorialized only by the minutes of the meeting, the hearing is not conducted in accordance with judicial procedure, and the ordinance in question does not give an appellant as a matter of right a trial in accordance with judicial procedure. Accordingly, declaratory judgment relief is proper. *Georgia Farm Bureau Mut. Ins. Co. v. DeKalb County*, 167 Ga. App. 577, 306 S.E.2d 924 (1983).

Cited in *Long v. England*, 28 Ga. App. 818, 113 S.E. 50 (1922); *Logan v. State*, 56 Ga. App. 460, 192 S.E. 839 (1937); *Britt v. State*, 65 Ga. App. 812, 16 S.E.2d 523 (1941); *Morman v. Pritchard*, 108 Ga. App. 247, 132 S.E.2d 561 (1963); *City of Atlanta v. Whitten*, 144 Ga. App. 224, 240 S.E.2d 771 (1977); *International Funeral Servs., Inc. v. DeKalb County*, 244 Ga. 707, 261 S.E.2d 625 (1979); *Sullivan v. Brownlee*, 174 Ga. App. 813, 331 S.E.2d 622 (1985); *Lee v. Hutson*, 810 F.2d 1030 (11th Cir. 1987); *Foreman v. City of College Park*, 199 Ga. App. 827, 406 S.E.2d 261 (1991); *Bearden v. City of Austell*, 212 Ga. App. 398, 441 S.E.2d 782 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, §§ 63-67.

C.J.S. — 14 C.J.S., Certiorari, §§ 89-92.

ALR. — Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari, 5 ALR2d 675.

5-4-13. Grant of writ for failure to prove venue or time of criminal offense.

No judge of a superior court shall grant a writ of certiorari or sustain the writ in a criminal or quasi-criminal case on the ground that the venue was not proved in the trial court or that the time of the commission of the offense was not proved, unless there is a distinct allegation in the petition for the writ of failure to prove the venue or time and an allegation of error as to such matters. (Ga. L. 1911, p. 149, § 1; Code 1933, § 19-404.)

JUDICIAL DECISIONS

Petition for certiorari containing allegation that there was failure to prove venue suffices, even though it does not appear that the distinct question of venue was raised in recorder’s court. *Garrett v. City of Atlanta*, 152 Ga. 675, 110 S.E. 886 (1922).

Lack of proof of venue cannot be raised for first time in Court of Appeals. — Where

there is no distinct allegation of failure to prove venue in trial court in petition of certiorari to superior court and no distinct brief of plaintiff in error, this section prohibits raising of question of lack of proof of venue for first time in Court of Appeals. *Sturman v. State*, 59 Ga. App. 498, 1 S.E.2d 467 (1939).

Where lack of proof of venue is not specifically raised by any general or special grounds of motion for new trial, that question may not be presented to Court of Appeals. *Charles v. State*, 64 Ga. App. 265, 13 S.E.2d 44 (1941).

Cited in *Parrish v. State*, 10 Ga. App. 836, 74 S.E. 445 (1912); *Rice v. City of Eatonton*, 15 Ga. App. 505, 83 S.E. 868 (1914).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 398-403.

5-4-14. Dismissal or return of writ to lower court with instructions; entry by superior court of final decision where no questions of fact involved.

(a) Upon the hearing of a writ of certiorari, the superior court may order the same to be dismissed or may return the same to the court from which it came with instructions.

(b) In all cases when the error complained of is an error in law which must finally govern the case, and the court is satisfied that there is no question of fact involved which makes it necessary to send the case back for a new hearing before the tribunal below, it shall be the duty of the judge of the superior court to make a final decision in the case without sending it back to the tribunal below. (Laws 1850, Cobb's 1851 Digest, p. 529; Code 1863, § 3975; Code 1868, § 3995; Code 1873, § 4067; Code 1882, § 4067; Civil Code 1895, § 4652; Civil Code 1910, § 5201; Code 1933, § 19-501.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DISMISSAL OF CERTIORARI

REMAND

FINAL JUDGMENT ON CERTIORARI

MODIFICATION OF SENTENCE OR CORRECTION OF VERDICT ON CERTIORARI

General Consideration

Upon certiorari, judge of superior court has right to pass upon credibility of witnesses. *Atlantic Coast Line R.R. v. Thomas*, 12 Ga. App. 209, 77 S.E. 13 (1913); *Macon v. United States Fid. & Guar. Co.*, 41 Ga. App. 774, 154 S.E. 702 (1930).

Upon certiorari, judge of superior court may exercise original discretion as to correctness of verdict, which is not possessed by other courts of review. *Atlantic Coast Line R.R. v. Thomas*, 12 Ga. App. 209, 77 S.E. 13 (1913); *Macon v. United States Fid. & Guar. Co.*, 41 Ga. App. 774, 154 S.E. 702 (1930).

Nature and extent of superior court

judge's discretion in reviewing evidence upon certiorari. — See *Brown v. Mosteller*, 181 Ga. 457, 182 S.E. 519 (1935).

Section applies to certiorari from verdict of jury in justice court. *Boroughs v. White & Stone*, 69 Ga. 841 (1883).

Section inapplicable to disposition of possessory warrant case. *Bush & Bro. v. Rawlins*, 80 Ga. 583, 5 S.E. 761 (1888).

Petition containing no assignment of error is void. — Petition for certiorari which does not plainly and distinctly set forth assignment of error on any ruling, decision, or judgment of inferior judicatory is void. *Wood v. Fairfax Loan & Inv. Co.*, 50 Ga. App.

General Consideration (Cont'd)

123, 177 S.E. 260 (1934).

Valid, dismissed certiorari may be renewed under § 9-2-61, but void certiorari is not renewable. — Where valid certiorari has been dismissed, it may be renewed within six months under provisions of § 9-2-61, but a petition for certiorari void for any reason cannot be renewed. *Wood v. Fairfax Loan & Inv. Co.*, 50 Ga. App. 123, 177 S.E. 260 (1934).

Judgment of superior court sustaining first certiorari is equivalent to first grant of new trial, and will not be interfered with unless verdict or judgment set aside by him was, as a matter of law, demanded. *Macon v. United States Fid. & Guar. Co.*, 41 Ga. App. 774, 154 S.E. 702 (1930).

Court may, upon final decision of case, direct magistrate to refund costs. — Such magistrate, though insolvent, may be compelled to perform his official duty. *Gault v. Wallis*, 53 Ga. 675 (1875). As to costs, see §§ 5204, 5205.

Cited in *Dorsey v. Black*, 55 Ga. 315 (1875); *Crusselle v. Chastain*, 76 Ga. 840 (1886); *Rogers v. Bennett*, 78 Ga. 707, 3 S.E. 660 (1887); *Mathis v. Bagwell*, 101 Ga. 167, 28 S.E. 638 (1897); *Hubert v. Southern Live-Stock Ins. Co.*, 103 Ga. 294, 29 S.E. 938 (1898); *Wilensky v. Brady*, 121 Ga. 90, 48 S.E. 687 (1904); *Strickland v. American Nat'l Bank*, 34 Ga. App. 549, 130 S.E. 598 (1925); *Shehane v. Wimbish*, 34 Ga. App. 608, 131 S.E. 104 (1925); *Flood v. Empire Inv. Co.*, 35 Ga. App. 266, 133 S.E. 60 (1926); *Whitworth v. Carter*, 39 Ga. App. 625, 147 S.E. 904 (1929); *Sellers v. McNair*, 42 Ga. App. 731, 157 S.E. 373 (1931); *J.M. High Co. v. Arrington*, 45 Ga. App. 392, 165 S.E. 151 (1932); *Rogers v. Echols*, 50 Ga. App. 711, 179 S.E. 131 (1935); *Murphy v. Drum & Bugle Corps.*, 55 Ga. App. 293, 190 S.E. 67 (1937); *Lewallen v. Dalton Auto & Mach. Co.*, 57 Ga. App. 328, 195 S.E. 305 (1938); *Williams v. Smith*, 66 Ga. App. 120, 17 S.E.2d 206 (1941); *Sneed v. State*, 72 Ga. App. 102, 33 S.E.2d 29 (1945); *Roberson v. City of Rome*, 72 Ga. App. 55, 33 S.E.2d 33 (1945); *Deaton v. Taliaferro*, 80 Ga. App. 685, 57 S.E.2d 215 (1950); *Brinkman v. City of Gainesville*, 83 Ga. App. 508, 64 S.E.2d 344 (1951); *Law v. State*, 92 Ga. App. 604, 89 S.E.2d 550 (1955); *Rogers v. Mayor of At-*

lanta, 110 Ga. App. 114, 137 S.E.2d 668 (1964); *Mayor of Atlanta v. Williams*, 124 Ga. App. 802, 186 S.E.2d 480 (1971); *Davey v. City of Atlanta*, 130 Ga. App. 687, 204 S.E.2d 322 (1974); *City of Atlanta v. Whitten*, 144 Ga. App. 224, 240 S.E.2d 771 (1977); *Hoyt v. Transfreight Lines*, 160 Ga. App. 154, 286 S.E.2d 491 (1981); *Lee v. Hutson*, 810 F.2d 1030 (11th Cir. 1987); *Johnson v. DeKalb County*, 214 Ga. App. 756, 449 S.E.2d 311 (1994).

Dismissal of Certiorari

"Dismiss" and "overrule" synonymous. — It would seem that the word "dismiss" under this section is in fact used in sense synonymous with "overrule." *Ray v. Cruce*, 21 Ga. App. 539, 94 S.E. 899 (1918).

Where judge's order uses "denied" instead of "dismissed," correction will be directed. *Atlantic C.L.R.R. v. Peters*, 32 Ga. App. 791, 124 S.E. 815 (1924).

Failure of judge to file proper answer will be sufficient reason to dismiss a certiorari, when no timely motion is made to perfect the same. *City of Atlanta v. Schaffer*, 245 Ga. 164, 264 S.E.2d 6 (1980).

Dismissal for justice's failure to send up copies of proceedings. — Failure of justice of peace to send up copies of proceedings in his court when they are necessary to determination of cause is good ground for dismissal of certiorari, but certiorari will not be dismissed where magistrate fails to send up copies of proceedings when errors complained of in petition, as verified by answer can be fully considered and determined without reference to such proceedings. *Lynn v. Crapps*, 47 Ga. App. 744, 171 S.E. 398 (1933).

Dismissal of certiorari affirmed where legally justified for reason other than that assigned. — Where order of judge of superior court dismissing petition for certiorari is proper and legally justified for reason other than that assigned by him, his action will be affirmed. *Anderson v. West Lumber Co.*, 51 Ga. App. 333, 179 S.E. 738 (1935).

Judgment overruling certiorari on merits will be affirmed where record indicates court lacked jurisdiction to entertain petition for certiorari. *Gilbert v. Land Estates, Inc.*, 62 Ga. App. 845, 9 S.E.2d 914 (1940).

Certiorari renewed under § 9-2-61 is properly dismissed where first certiorari was not

dismissed on merits. *Sheehan v. City Council*, 8 Ga. App. 539, 69 S.E. 916 (1911).

Dismissal not proper, though evidence is doubtful whether writ was filed with petition. *Spencer v. Gill*, 23 Ga. 8 (1857).

No dismissal due to insufficiency of affidavit to support petition where answer supports petition. *Taylor v. Gay*, 20 Ga. 77 (1856).

Failure to prosecute writ. — Dismissal is not proper for failure to prosecute writ where counsel for defendant removes papers. *Hopkins, Allen & Co. v. Suddeth*, 18 Ga. 518 (1855).

Remand

Case must be returned even though record shows that verdict lacks evidence to support it. *Alabama G.S.R.R. v. Austin*, 112 Ga. 61, 37 S.E. 91 (1900); *Patterson v. Central of Ga. Ry.*, 117 Ga. 827, 45 S.E. 250 (1903); *Fain v. Pilcher & Booth*, 31 Ga. App. 115, 120 S.E. 27 (1923).

When final determination of case tried in inferior court and carried by certiorari to superior court does not depend upon any controlling question of law, and there are issues of fact involved, superior court has no authority to render final judgment therein, although it may clearly appear from facts disclosed by record that verdict rendered in lower court was without evidence to support it. *Smith v. J.J. Williamson & Sons*, 43 Ga. App. 702, 159 S.E. 912 (1931).

In case when only error alleged is that verdict is contrary to law and evidence, it is erroneous to render final judgment in petitioner's favor, for the reason that in such case error complained of is not one of law which must finally govern the case. *Tuten v. Towles*, 36 Ga. App. 328, 136 S.E. 537 (1927).

A case may be returned even though record shows that verdict lacks evidence to support it. This is so notwithstanding former certiorari in same case complaining of similar verdict was sustained. *Alabama G.S.R.R. v. Austin*, 112 Ga. 61, 37 S.E. 91 (1900); *Patterson v. Central of Ga. Ry.*, 117 Ga. 827, 45 S.E. 250 (1903); *Fain v. Pilcher & Booth*, 31 Ga. App. 115, 120 S.E. 27 (1923).

Judge may give directions as to verdict on retrial in event evidence is same. — In such case, the court may direct that if evidence is substantially same on next trial, verdict for

defendant should be rendered. *Baker v. Kendrick*, 9 Ga. App. 382, 71 S.E. 498 (1911).

Where certiorari is sustained on ground that venue was not established. — Where, upon conviction in criminal court of county, defendant applied for writ of certiorari to superior court of county on ground that state had failed to establish venue of case, and upon hearing, state admitted its failure to establish venue, it is proper for superior court to sustain certiorari and remand case to trial court for another trial, and it is not proper for superior court in such case to enter final judgment therein, as error complained of is not an error of law which must finally govern the case, and it cannot be known with certainty that evidence on another trial would be the same. *Arnold v. State*, 88 Ga. App. 710, 77 S.E.2d 550 (1953).

On new trial by superior court order, formal evidence of latter's judgment is unnecessary. — After case has been tried in justice's court and on certiorari new trial has been ordered, same may be lawfully had in magistrate's court without producing therein any formal evidence of judgment rendered in superior court. *Odell v. Dozier*, 104 Ga. 203, 30 S.E. 813 (1898).

Final Judgment on Certiorari

When court must render final judgment on certiorari. — Provision of section, which requires judge of superior court to make final decision in case which is before him on certiorari, is mandatory only when nature of error complained of is such that law forbids result which was reached, no matter what testimony was, and regardless of what testimony may be adduced should there be another trial of the case. *Atlantic Coast Line R.R. v. Thomas*, 12 Ga. App. 209, 77 S.E. 13 (1913).

Wherever case can be determined as a matter of law, the court must make final disposition of it. *Longshore v. Collier*, 37 Ga. App. 450, 140 S.E. 636 (1927).

Where issues of fact are involved, case must be returned to lower court with instructions. *Sapp v. Adams*, 65 Ga. 600 (1880); *Rogers v. Georgia R.R.*, 100 Ga. 699, 28 S.E. 457 (1897); *Williams v. Bradfield*, 116 Ga. 705, 43 S.E. 57 (1902); *Jeffries v. Luke*, 5 Ga. App. 157, 62 S.E. 719 (1908).

Final Judgment on Certiorari (Cont'd)

When court may render final judgment on certiorari. — Court may render final judgment on certiorari, where no issue of fact is involved, and error assigned is a question of law which must finally govern the case. *James v. Smith & Bro.*, 62 Ga. 345 (1879); *Cone Export & Comm'n Co. v. McCalla*, 113 Ga. 17, 38 S.E. 336 (1901); *Hewett v. Robertson*, 124 Ga. 920, 53 S.E. 456 (1906); *Porterfield v. Thompson*, 4 Ga. App. 524, 61 S.E. 1055 (1908); *Walton v. Shakespear*, 18 Ga. App. 140, 88 S.E. 906 (1916); *Dixon v. Pierce*, 22 Ga. App. 291, 95 S.E. 995 (1918).

Discretion of court will not be controlled unless manifestly abused. *Ayers v. Taylor*, 54 Ga. 264 (1875).

Where no dispositive question of law is presented. — Judge of superior court is not authorized to render final decision where there is no question of law before it which must finally govern case, and only issues of fact are involved. *Sellers v. McNair*, 42 Ga. App. 731, 157 S.E. 373 (1931).

Where issues of fact are involved, superior court has no authority to render final judgment, and even though former judgment is without evidence to support it, superior court must remand case for new trial. *Putnam v. Sewell*, 86 Ga. App. 298, 71 S.E.2d 566 (1952).

Where issues of fact are involved, final judgment cannot be passed on certiorari. *Desvergers v. Kruger*, 60 Ga. 100 (1878); *Almand v. Georgia R.R. & Banking Co.*, 102 Ga. 151, 29 S.E. 159 (1897); *Pittman v. Alexander*, 19 Ga. App. 475, 91 S.E. 910 (1917).

If there is question of fact, whether disputed or not, court cannot enter final judgment. *Hardison v. Gledhill*, 72 Ga. App. 432, 33 S.E.2d 921 (1945). But see *Rome R.R. v. Ransom*, 78 Ga. 705, 3 S.E. 626 (1887); *Longshore v. Collier*, 37 Ga. App. 450, 140 S.E. 636 (1927).

Where only question involves sufficiency of evidence to support finding in justice's court, superior court judge errs in rendering final judgment. *Gowder v. Smith*, 62 Ga. App. 647, 9 S.E.2d 197 (1940).

Court may make final disposition of case involving law and facts where latter not disputed. *Longshore v. Collier*, 37 Ga. App. 450, 140 S.E. 636 (1927). But see *Hardison v.*

Gledhill, 72 Ga. App. 432, 33 S.E.2d 921 (1945).

Section permits final disposition of case, even though facts are involved, if not conflicting. *Rome R.R. v. Ransom*, 78 Ga. 705, 3 S.E. 626 (1887). But see *Hardison v. Gledhill*, 72 Ga. App. 432, 33 S.E.2d 921 (1945).

Certiorari may be sustained at instance of defendant, although evidence is conflicting. *Hancock v. Allen*, 29 Ga. App. 611, 116 S.E. 321 (1923).

Use of legal question involved in motion to dismiss, overruled below, to render final judgment. — Superior court judge may make use of question of law involved in demurrer (now motion to dismiss), which was wholly overruled by justice at trial, to dispose finally of case without sending it back for new hearing. *Sellers v. McNair*, 42 Ga. App. 731, 157 S.E. 373 (1931).

It is immaterial upon what ground judge based decision if judgment on certiorari is correct. *Nightingale v. Mayor of Brunswick*, 26 Ga. App. 43, 105 S.E. 382 (1920); *Hines v. Porter*, 26 Ga. App. 178, 106 S.E. 16 (1921).

Modification of Sentence or Correction of Verdict on Certiorari

Sentence which does not exceed maximum of statute cannot be modified by the superior court. *Johnson v. City of Hawkinsville*, 27 Ga. App. 801, 110 S.E. 23 (1921).

Superior court has no power, under writ of certiorari, to modify sentence passed by city court and not imposing punishment beyond maximum prescribed by law. *Sellers v. McNair*, 42 Ga. App. 731, 157 S.E. 373 (1931).

Where verdict exceeds amount claimed. — When superior court properly overrules all grounds of petition for certiorari save one presenting point that verdict under review was contrary to law because for an amount larger than that sued for, that court may, with assent of plaintiff, correct verdict and judgment entered thereon by reducing them to amount claimed in action, and then allow same to stand. *Sellers v. McNair*, 42 Ga. App. 731, 157 S.E. 373 (1931).

Court may under this section, with assent of plaintiff, correct verdict and judgment entered thereon by reducing them to amount claimed in action, and then allow

same to stand. *Seaboard Air-Line Ry. v. Christian*, 115 Ga. 742, 42 S.E. 66 (1902).

should be corrected on certiorari. *Carnes v. Mattox*, 71 Ga. 515 (1883).

If trial jury erred in finding interest, error

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, *Certiorari*, §§ 52-61, 73-75.

C.J.S. — 14 C.J.S., *Certiorari*, §§ 73-84, 107-112.

ALR. — Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari, 5 ALR2d 675.

5-4-15. Requirement of new trial when writ not answered.

In all cases pending in the superior courts upon certiorari from any inferior judicatory or any person exercising judicial powers, if the judge or other officer before whom the case was tried dies before answering the writ of certiorari or answers that he cannot or does not remember or recollect what occurred at the trial of the case and he therefore cannot or does not make answer to the same, it shall be the duty of the judge who granted the writ of certiorari forthwith to order a new trial of the case in the court below. (Ga. L. 1861, p. 63, § 1; Code 1868, § 3996; Code 1873, § 4068; Code 1882, § 4068; Civil Code 1895, § 4653; Ga. L. 1899, p. 38, § 1; Civil Code 1910, § 5202; Code 1933, § 19-502; Ga. L. 1933, p. 113, § 1.)

JUDICIAL DECISIONS

Section applicable only where application for certiorari is valid and contains no fatal defect which renders it subject to dismissal. *Miller v. Miller*, 96 Ga. App. 469, 100 S.E.2d 594 (1957).

Where justice answered but was ordered to amplify answer and died before doing so, section is inapplicable. *Atlantic Coast Line R.R. v. Peters*, 32 Ga. App. 791, 124 S.E. 815 (1924).

Where plaintiff failed to make appropriate, timely motion, section does not affect

dismissal under § 5-4-7. *Mathis v. City of Nashville*, 49 Ga. App. 309, 175 S.E. 383 (1934).

Cited in *Crine v. Morton Salt Co.*, 178 Ga. 754, 174 S.E. 347 (1934); *Orr v. State*, 55 Ga. App. 150, 189 S.E. 540 (1937); *DeBerry v. Spikes*, 188 Ga. 222, 3 S.E.2d 719 (1939); *Delinski v. Dunn*, 206 Ga. 825, 59 S.E.2d 248 (1950); *Delinski v. Dunn*, 207 Ga. 723, 64 S.E.2d 44 (1951).

RESEARCH REFERENCES

C.J.S. — 14 C.J.S., *Certiorari*, §§ 110, 111.

5-4-16. Recovery of costs by plaintiff where certiorari sustained; recovery of costs by plaintiff where certiorari returned to lower court for new trial.

If after the hearing the certiorari is sustained and a final decision thereon is made by the superior court, the plaintiff may have judgment entered for the amount recovered by him in the court below, the costs paid to obtain

the certiorari, and the costs in the superior court. If the certiorari is returned to the court below for a new hearing, the plaintiff shall have judgment entered for the costs in the superior court only, leaving the costs paid to obtain the certiorari to be awarded upon the final trial below. (Orig. Code 1863, § 3977; Code 1868, § 3998; Code 1873, § 4070; Code 1882, § 4070; Civil Code 1895, § 4655; Civil Code 1910, § 5204; Code 1933, § 19-504.)

JUDICIAL DECISIONS

Where certiorari is sustained, losing party is liable for costs in superior court. *Walker v. Hillyer*, 130 Ga. 466, 61 S.E. 8 (1908).

Costs paid by losing party cannot be recovered even though he may finally succeed in lower court. *Walker v. Hillyer*, 130 Ga. 466, 61 S.E. 8 (1908).

Amount of costs taxed will aid in determining whether final judgment under § 5-4-14 was rendered. *Whiddon v. Atlantic Coast Line R.R.*, 21 Ga. App. 377, 94 S.E. 617 (1917).

Improperly taxed costs of certiorari may be written off on appeal. — Where case is returned and costs paid to obtain certiorari

are improperly taxed, they may be written off on appeal. *Tison v. Savannah, Fla. & W. Ry.*, 97 Ga. 366, 24 S.E. 456 (1895); *Haire v. McCardle*, 107 Ga. 775, 33 S.E. 683 (1899).

Sustaining certiorari and returning case for another hearing discharge security on bond. — When certiorari is sustained and case sent back for another hearing, security thereon is discharged from further liability, and may become security on subsequent certiorari bond in same case. *Western & Atl. R.R. v. Carder*, 120 Ga. 460, 47 S.E. 930 (1904).

Cited in *Williams v. Smith*, 66 Ga. App. 120, 17 S.E.2d 206 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, §§ 1009-1023.

5-4-17. Recovery of costs by defendant generally.

If the certiorari is dismissed and a final decision is made in the case by the superior court, the defendant in certiorari may have judgment entered in the superior court against the plaintiff and his security for the sum recovered by him, together with the costs in the superior court; and if the case is sent back to the court below, and there is a judgment in the case in favor of the defendant in the court below the security on the certiorari bond shall then be included as in case of security on appeal. (Orig. Code 1863, § 3978; Code 1868, § 3999; Code 1873, § 4071; Code 1882, § 4071; Civil Code 1895, § 4656; Civil Code 1910, § 5205; Code 1933, § 19-505.)

JUDICIAL DECISIONS

Attorney fees are not "costs in the superior court" within the contemplation of this section. *Bearden v. City of Austell*, 212 Ga. App. 398, 441 S.E.2d 782 (1994).

Judgment for defendant for amount re-

covered below, with costs, implies dismissal. — Judgment of superior court which, upon hearing of certiorari, is rendered in favor of defendant therein for amount recovered by him in municipal court, with costs, implies

dismissal of certiorari, and is not subject to exception that it was error to enter such judgment without either overruling or sustaining the certiorari. *Phelps v. Belle Isle*, 29 Ga. App. 571, 116 S.E. 217 (1923).

Where certiorari dismissed for nonpayment of costs, judgment against plaintiff and surety cannot be dismissed. *Ray v. Cruce*, 21 Ga. App. 539, 94 S.E. 899 (1918).

Where certiorari in bail trover action is dismissed and costs awarded. — Where certiorari in bail trover action is dismissed, and judgment for costs of proceedings are taxed against plaintiff, action on usual condemna-

tion bond will lie for value of property, if lost or destroyed. *Jones v. Funston*, 22 Ga. App. 410, 95 S.E. 1003 (1918), later appeal, 23 Ga. App. 706, 99 S.E. 237 (1919), later appeal, 25 Ga. App. 92, 102 S.E. 541 (1920).

Cited in *Carnes v. Mattox*, 71 Ga. 515 (1883); *Odell v. Dozier*, 104 Ga. 203, 30 S.E. 813 (1898); *Thompson v. Dean*, 15 Ga. App. 757, 84 S.E. 205 (1915); *Bailey v. Ware & Harper*, 19 Ga. App. 255, 91 S.E. 275 (1917); *Crine v. Morton Salt Co.*, 49 Ga. App. 150, 174 S.E. 723 (1934); *Armstrong v. Mayor of Savannah*, 250 Ga. 121, 296 S.E.2d 690 (1982).

RESEARCH REFERENCES

C.J.S. — 14 C.J.S., Certiorari, § 202.

5-4-18. Recovery of damages for frivolous certiorari.

If it shall be made to appear that a certiorari was frivolous and was applied for without good cause or only for the purpose of delay, the presiding judge before whom the writ was heard, on motion of the opposite party, may order that damages totaling not more than 20 percent of the sum adjudged to be due be recovered by the defendant in certiorari against the plaintiff in certiorari and his security; and judgment may be entered and execution issued accordingly. (Ga. L. 1857, p. 104, § 2; Code 1863, § 3976; Code 1868, § 3997; Code 1873, § 4069; Code 1882, § 4069; Civil Code 1895, § 4654; Civil Code 1910, § 5203; Code 1933, § 19-503.)

JUDICIAL DECISIONS

Cited in *Miller Co. v. Anderson*, 118 Ga. 432, 45 S.E. 365 (1903); *Flood v. Empire Inv. Co.*, 35 Ga. App. 266, 133 S.E. 60 (1926).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, § 1024.

5-4-19. Operation of writ of certiorari as supersedeas in civil cases.

The writ of certiorari, when granted in civil cases, shall operate as a supersedeas of the judgment until the final hearing in the superior court. (Laws 1850, Cobb's 1851 Digest, p. 529; Code 1863, § 3968; Code 1868, § 3988; Code 1873, § 4060; Code 1882, § 4060; Civil Code 1895, § 4645; Civil Code 1910, § 5191; Code 1933, § 19-213.)

JUDICIAL DECISIONS

This section is a codification of common law. *Dixon v. Sable*, 147 Ga. 623, 95 S.E. 240 (1918).

Mere intention to apply for writ does not operate as a supersedeas. *Seamans v. King*, 79 Ga. 611, 5 S.E. 53 (1887).

There is no supersedeas prior to sanction of petition in absence of special order. *Seamans v. King*, 79 Ga. 611, 5 S.E. 53 (1887).

Certiorari stops case at stage where it is when certiorari is served on magistrate; it does not move case backwards. *Taylor v. Gay*, 20 Ga. 77 (1856); *Board of Comm'rs v. Wimberly*, 55 Ga. 570 (1876); *Johns v. McBride*, 28 Ga. App. 686, 112 S.E. 831 (1922).

If on hearing in superior court writ is denied, supersedeas ends and inferior court

may proceed. *Loeb v. Mangum*, 134 Ga. 335, 67 S.E. 882 (1910); *Equitable Life Assurance Soc'y v. Culp*, 159 Ga. 874, 127 S.E. 225 (1925).

In bailable criminal cases, supersedeas stays execution of sentence, but does not discharge prisoner from confinement. *Dixon v. State*, 121 Ga. 346, 49 S.E. 311 (1904).

Cited in *Waller v. Hogan*, 92 Ga. 528, 17 S.E. 919 (1893); *Gurr v. Gurr*, 95 Ga. 559, 22 S.E. 304 (1895); *King v. Haley*, 146 Ga. 85, 90 S.E. 715 (1916); *Hargett v. City of Columbus*, 36 Ga. App. 628, 137 S.E. 911 (1927); *Owens v. Watkins*, 189 Ga. 311, 5 S.E.2d 905 (1939); *McCants v. Underwood*, 70 Ga. App. 641, 29 S.E.2d 287 (1944); *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, *Certiorari*, § 46.

C.J.S. — 14 C.J.S., *Certiorari*, §§ 60-62.

5-4-20. Supersedeas of criminal conviction; bond; affidavit of indigence; effect of supersedeas.

(a) Any person who has been convicted of any criminal or quasi-criminal offense or violation of any ordinance, in any inferior judicatory by whatever name called, except constitutional city courts or state courts, exercising criminal or quasi-criminal jurisdiction, who desires a writ of certiorari to review and correct the judgment of conviction in the case shall be entitled to a supersedeas of the judgment if he files with the clerk of the court, or, if there is no clerk, with the judge thereof, or with the commissioners if it is a court presided over by commissioners with no clerk, a bond payable to the state, or, if the conviction is in a municipal court, payable to the municipality, in amount and with security acceptable to and to be approved by the clerk, judge, or majority of the commissioners, as the case may be, conditioned that the defendant will personally appear and abide the final judgment, order, or sentence upon him in the case. The bond, if payable to the state, may be forfeited in the same manner as any other criminal bond in any court having jurisdiction. If the bond is payable to the municipal corporation, it may be forfeited according to the procedure prescribed in the municipal ordinance or charter. Alternatively, an action may be brought on the bond in any court having jurisdiction. Upon the giving of bond the defendant shall be released from custody in like manner as defendants are released upon supersedeas bonds in criminal cases where a notice of appeal has been filed.

(b) If the defendant is unable because of his indigence to give bond and makes this fact appear by affidavit to be filed with the judge, clerk, or commissioners, as the case may be, the same shall operate as a supersedeas of the judgment; provided, however, that the defendant shall not be set at liberty unless he gives bond as prescribed in subsection (a) of this Code section.

(c) The supersedeas provided for in this Code section shall operate to suspend the judgment of conviction until the case is finally heard and determined by the superior court to which it is taken by certiorari or by the Court of Appeals upon appeal, provided that within the time prescribed by law the defendant shall apply for and procure the writs and remedies provided by law for reviewing the judgment complained of. The supersedeas shall be equally applicable whether the judge of the superior court to whom the petition for certiorari is presented sanctions it or refuses it, provided that within the time provided by law the defendant diligently files a notice of appeal.

(d) The object of this Code section is to provide a method by which a defendant may obtain a supersedeas so long as he is prosecuting or is entitled under the law to prosecute the proceeding brought or to be brought to review the conviction of which he is complaining, or any intermediate appellate judgment rendered thereon, in order that the defendant shall not be deprived of his right to apply to the courts by being compelled to serve his sentence or pay a fine before he has had the full opportunity allowed him by law of taking the necessary proceedings to correct and review his conviction. (Ga. L. 1902, p. 105, § 1; Ga. L. 1909, p. 148, §§ 1-3; Civil Code 1910, §§ 5192, 5193, 5194; Code 1933, §§ 19-214, 19-215, 19-216; Ga. L. 1982, p. 3, § 5.)

Cross references. — Bonds and recognizances generally, Ch. 6, T. 17.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICABILITY

BOND

1. IN GENERAL
2. EXECUTION AND SIGNATURES
3. VALIDITY OF BOND

General Consideration

Applies to certiorari from inferior judicatories exercising criminal or quasi-criminal jurisdiction. — In all cases for writ of certiorari from inferior judicatory exercising criminal or quasi-criminal jurisdiction, filing of bond, or making of pauper's affidavit, is

condition precedent to application. *Sauceman v. State*, 209 Ga. 60, 70 S.E.2d 754 (1952).

Condition to certiorari from municipal court judgment. — Filing of bond or making of pauper affidavit, required under this section, relating to certiorari sued to review

General Consideration (Cont'd)

judgment of municipal court, is condition precedent to application for certiorari. *Nilsen v. City of La Grange*, 55 Ga. App. 676, 191 S.E. 175 (1937).

Condition precedent to review of conviction in recorder's court. — Filing of bond required by subsection (a) or pauper's affidavit provided for under subsection (b) is condition precedent to application for certiorari to review judgment of conviction in recorder's court. *Long v. City of Crawfordville*, 55 Ga. App. 182, 189 S.E. 685 (1937); *West v. City of College Park*, 116 Ga. App. 355, 157 S.E.2d 491 (1967).

Condition precedent to review of conviction in city court. — Filing of security bond or pauper's affidavit is condition precedent to application for certiorari to review judgment of conviction in city court. *Ellett v. City of College Park*, 135 Ga. App. 269, 217 S.E.2d 374 (1975).

Failure to give bond required by section authorizes refusal to sanction petition. *Roberts v. Mayor of Colquitt*, 17 Ga. App. 557, 87 S.E. 816 (1916).

Unless it appears that requirements as to giving bond have been fully complied with, petition for certiorari should not be sanctioned. *Mantovani v. City of Atlanta*, 43 Ga. App. 787, 160 S.E. 129 (1931).

The appearance-supersedeas bond in certiorari must be executed according to provisions of this section as condition precedent to sanctioning of the application. *Soles v. City of Vidalia*, 92 Ga. App. 839, 90 S.E.2d 249 (1955).

Failure to aver filing of bond or affidavit renders petition void. — Failure to aver in petition for certiorari that bond has been filed or affidavit made, renders petition void. *Nilsen v. City of La Grange*, 55 Ga. App. 676, 191 S.E. 175 (1937).

Petition sanctioned in spite of noncompliance with bond requirements should be dismissed on hearing. *Mantovani v. City of Atlanta*, 43 Ga. App. 787, 160 S.E. 129 (1931).

If writ has been improperly sanctioned, dismissal will be necessary. *Flynn v. City of E. Point*, 18 Ga. App. 729, 90 S.E. 372 (1916).

Dismissal proper for failure to file bond or make affidavit. — Where neither bond nor the pauper affidavit in lieu thereof was

filed in mayor's court as provided by this section there was no error in dismissing certiorari. *Archer v. City of Fayetteville*, 14 Ga. App. 24, 80 S.E. 34 (1913).

Cited in *Laws v. State*, Ga. App. 361, 83 S.E. 279 (1914); *Hubert v. City of Thomasville*, 18 Ga. App. 756, 90 S.E. 720 (1916); *Ronemous v. State*, 87 Ga. App. 588, 74 S.E.2d 676 (1953); *Hodges v. Bruce*, 209 Ga. 871, 76 S.E.2d 801 (1953); *Beard v. City of Atlanta*, 91 Ga. App. 584, 86 S.E.2d 672 (1955); *Clegg v. City of Vidalia*, 91 Ga. App. 852, 87 S.E.2d 362 (1955); *Coleman v. Mayor of Savannah*, 102 Ga. App. 664, 117 S.E.2d 186 (1960); *City of Gainesville v. Butts*, 127 Ga. App. 140, 193 S.E.2d 59 (1972); *Ellett v. City of College Park*, 233 Ga. 858, 213 S.E.2d 700 (1975); *Mulling v. Wilson*, 245 Ga. 773, 267 S.E.2d 212 (1980).

Applicability

Motion to vacate and set aside verdict and judgment in criminal case. — See *Hodges v. Balkcom*, 209 Ga. 856, 76 S.E.2d 798 (1953).

Where nonauthority exists to fine or imprison defendant. — A case is not a criminal or quasi-criminal proceeding where issues before police committee of general council of city were in nature of a civil proceeding, and committee had no authority to fine or to deprive officer of his liberty, but the only authority vested in them was to exonerate, to suspend, or to discharge. *City of Atlanta v. Stallings*, 72 Ga. App. 52, 33 S.E.2d 18 (1945).

Certiorari from proceeding in municipal court to determine whether nuisance exists. — Proceeding in municipal court to determine question of whether nuisance exists is not criminal or quasi-criminal in nature, since court cannot fine or imprison defendant in error, and bond required for certiorari is that provided for in § 5-4-5 for civil proceedings, and bond under this section will not suffice. *City of Atlanta v. Pazol*, 95 Ga. App. 598, 98 S.E.2d 216 (1957).

Review of revocation of probationary sentences is not review of judgment of conviction. — Defendants, who were confined upon revocation of probationary sentences and who sought review by certiorari of order of revocation, were not entitled to be released on bond, since they were not seeking to review a judgment of conviction within provisions of this section and § 17-6-1. Fos-

ter v. Jenkins, 210 Ga. 383, 80 S.E.2d 277 (1954).

Bond

1. In General

Bond shall be conditioned to abide final judgment of superior court as well as inferior court. — Bond approved by clerk of lower court, if there be one, conditioned to abide final judgment of superior court, as well as inferior court, must be filed as a condition precedent to obtaining writ of certiorari. *Moon v. City of Jefferson*, 10 Ga. App. 572, 73 S.E. 854 (1912).

Should be conditioned that defendant appear and abide by judgment. — Bond conditioned for appearance of defendant to abide final judgment of superior court is insufficient. It should be conditioned to appear "and" abide by final judgment, as the two conditions are not synonymous. *Scott v. City of Camilla*, 7 Ga. App. 689, 67 S.E. 846 (1910); *Ruffin v. City of Millen*, 18 Ga. App. 784, 90 S.E. 654 (1916).

Abrogation of bond. — Where one convicted of misdemeanor in county criminal court has appealed by certiorari and successive writs of error all the way up to the Supreme Court of the United States, and verdict and sentence have been affirmed, and remittitur from the Court of Appeals of Georgia affirming such verdict and sentence has been made the judgment of superior court, such verdict and sentence become final; and where defendant is thereafter arrested, the supersedeas certiorari bond executed in that case is abrogated and becomes functus officio, and defendant is not thereafter entitled to remain at liberty by virtue of such bond. *Hodges v. Balkcom*, 209 Ga. 856, 76 S.E.2d 798 (1953).

2. Execution and Signatures

Where agent for surety signs certiorari bond, his authority must expressly appear. — Where on certiorari from trial court, certiorari bond is signed by one as agent for surety named thereon, authority of such agent must expressly appear. *Taylor v. City of Atlanta*, 84 Ga. App. 739, 67 S.E.2d 143 (1951).

Where attorney signs bond for surety without power of attorney attached. — Where

defendant in certiorari made motion to dismiss certiorari, for reason that surety on certiorari bond had executed same by his attorney and that bond was not valid bond, because no power of attorney was attached thereto showing authority of attorney to sign bond for surety, court properly sustained motion and dismissed certiorari. *Mantovani v. City of Atlanta*, 43 Ga. App. 787, 160 S.E. 129 (1931).

3. Validity of Bond

Bond payable to city recorder charged with responsibilities involving forfeiture of appearance bonds. — Where city recorder is person charged with responsibility of forfeiting appearance bonds when their conditions have not been complied with, and he necessarily does so for and on behalf of the city as such officer, petition showing that bond hereunder was made payable to city recorder or his successors in office affirmatively shows a valid contract between obligors and city for this purpose, and it was not subject to dismissal upon this ground. *Soles v. City of Vidalia*, 92 Ga. App. 839, 90 S.E.2d 249 (1955).

Bonds filed in municipal court, payable to Governor. — Bonds filed by defendants in municipal trial court, naming therein as obligee the Governor of Georgia and his successor in office are not legal bonds as are contemplated under provisions of this section, and failure of petitioners to give proper bond rendered their petition for certiorari void. *Coleman v. Mayor of Savannah*, 102 Ga. App. 664, 117 S.E.2d 186 (1960).

Filing of bond is not affirmatively established by allegations to that effect in petition. *Hubert v. City of Thomasville*, 18 Ga. App. 756, 90 S.E. 720 (1916).

Certificate of clerk or trial judge approving bond is not conclusive of bond's validity. — While certificate from clerk or presiding officer of trial court that bond has been accepted and approved should be accepted as prima facie true, it is not conclusive that proper bond has been given; and if bond itself is sent up with the record and shows on its face that legal bond has not been given, certiorari should be dismissed. *Mantovani v. City of Atlanta*, 43 Ga. App. 787, 160 S.E. 129 (1931).

In petition for certiorari from recorder's court, approval of bond by city clerk is

Bond (Cont'd)

3. Validity of Bond (Cont'd)

insufficient. — Where, in petition for certiorari to superior court to correct judgment of recorder's court convicting petitioner of violation of a city ordinance, instead of being approved by clerk of recorder's court or by recorder in absence of clerk, the

supersedeas-appearance bond attached to petition was approved by city clerk, superior court did not err in overruling petition for certiorari, as conditions precedent to application for certiorari, established by this section in such cases as this, are mandatory. *Griffin v. City of Albany*, 88 Ga. App. 229, 76 S.E.2d 436 (1953).

OPINIONS OF THE ATTORNEY GENERAL

Signing one's own bond and depositing security in cash. — Bond requirements do not specify posting of property bond, but only that bond should be "in amount and with security acceptable to and to be approved by the clerk"; apparently there would be no prohibition against a person signing

his own bond and depositing required security in cash. 1963-65 Op. Att'y Gen. p. 32.

Whether a person signs his own bond and deposits the required security in cash addresses itself to sole discretion of clerk approving bond. 1963-65 Op. Att'y Gen. p. 32.

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, §§ 32-46.

C.J.S. — 14 C.J.S., Certiorari, §§ 49-53, 60-62.

ALR. — What costs or fees are contemplated by statute authorizing proceeding in forma pauperis, 98 ALR2d 292.

CHAPTER 5

NEW TRIAL

Article 1		Sec.	
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Article 3			
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5-5-40.	Time of motion for new trial generally; amendments; extension of time for filing transcript; time of hearing; priority to cases in which death penalty imposed;	5-5-48.	Right to give supersedeas bond for bailable offense upon filing of new trial motion; assessment and approval of bond.
		5-5-49.	Time of new trial generally.
		5-5-50.	Trial of cases returned for new trial by appellate courts.
		5-5-51.	Standard for review by appellate court of first grant of new trial.
			Written basis for exercise of judicial discretion for new trial.

Cross references. — See Ga. Const. 1983, Art. VI, Sec. I, Para. IV.

RESEARCH REFERENCES

ALR. — Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded, 98 ALR 941; 29 ALR2d 1199.

Right of trial court to grant new trial as affected by appellate proceedings, 139 ALR 340.

Power of trial court or judge to revoke order granting new trial in criminal case, 145 ALR 400.

Power of court to vacate or modify order

granting new trial in civil case, 61 ALR2d 642.

Participation in, acceptance of, or submission to new trial as precluding appellate review of order granting it or of issue determined in first trial, 67 ALR2d 191.

Absence of convicted defendant during hearing or argument of motion for new trial or in arrest of judgment, 69 ALR2d 835.

Disqualification of original trial judge to

sit on retrial after reversal or mistrial, 60 ALR3d 176.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial, 98 ALR3d 997.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case, 43 ALR4th 410.

Jury trial waiver as binding on later state civil trial, 48 ALR4th 747.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

ARTICLE 1

GENERAL PROVISIONS

5-5-1. Power of probate, superior, state, and city courts.

(a) The superior, state, and city courts shall have power to correct errors and grant new trials in cases or collateral issues in any of the respective courts in such manner and under such rules as they may establish according to law and the usages and customs of courts.

(b) Probate courts shall have power to correct errors and grant new trials in civil cases provided for by Article 6 of Chapter 9 of Title 15 under such rules and procedures as apply to the superior courts. (Laws 1799, Cobb's 1851 Digest, p. 503; Code 1863, § 3636; Code 1868, § 3661; Code 1873, § 3712; Code 1882, § 3712; Civil Code 1895, § 5474; Civil Code 1910, § 6079; Code 1933, § 70-102; Ga. L. 1986, p. 982, § 4.)

Editor's notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

Law reviews. — For annual survey on trial practice and procedure, see 38 Mercer L. Rev. 383 (1986).

JUDICIAL DECISIONS

Section grants superior courts power to correct errors and grant new trials. Frank v. State, 142 Ga. 741, 83 S.E. 645, 1915D L.R.A. 817, writ of error denied, 235 U.S. 694, 35 S. Ct. 208, 59 L. Ed. 429 (1914) (decided under former Code 1933, § 70-102, at time when section referred only to superior courts).

Superior court of the county in which defendant was convicted of murder had authority, on defendant's motion for new trial, to order an expert evaluation of defendant, who was incarcerated beyond the boundaries of the county in which the court sat. Zant v. Brantley, 261 Ga. 817, 411 S.E.2d 869 (1992).

What constitutes a city court. — See Welborne v. State, 114 Ga. 793, 40 S.E. 857

(1902) (decided under former Penal Code 1895, § 1056).

New trials are granted by superior court as a court, not by presiding judge in capacity as judge. Allen v. State, 102 Ga. 619, 29 S.E. 470 (1897) (decided under former Penal Code 1895, § 1056).

New trial may be granted after trial before jury and before appeal. Eufaula Home Ins. Co. v. Plant & Cubbedge, 37 Ga. 672 (1868).

Discretion of trial court. — Trial court is vested with discretion in granting new trials. Martin & Sons v. Bank of Leesburg, 137 Ga. 285, 73 S.E. 387 (1911).

Where trial judge refuses to order new trial on ground of inadequate damages in tort action, this court will interfere with that

discretion only in case of manifest abuse. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Certiorari lies though court may grant new trial. — Although city court may have power to grant new trials, it is an inferior court whose final judgments may be reviewed by superior court upon certiorari. *Archie v. State*, 99 Ga. 23, 25 S.E. 612 (1896).

First grant of new trial by judge of superior court is never disturbed by appellate court, unless it is made to appear that in doing so he manifestly abused discretion resting in him. *Law v. Hodges*, 53 Ga. App. 319, 185 S.E. 584 (1936).

Mere difference of opinion as to amount of recovery. — New trial should not be granted based on mere difference of opinion between appellate court and jury as to amount of recovery in action of tort for unliquidated damages. Something more must be disclosed to warrant interference, where substantial damages have been returned. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Bias, passion, prejudice, or mistake must appear to justify setting aside verdict. — Where amount of verdict, though less than appellate court would have approved, does not afford such evidence of bias, passion, prejudice, or mistake as to justify setting it aside as inadequate, appellate court must affirm it. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Presumption that trial judge knew rule as to obligation to approve jury's verdict. — In interpreting language of order overruling motion for new trial, appellate court must presume that trial judge knew rule as to obligation to approve jury's verdict devolving upon him, and that in overruling motion he did exercise this discretion, unless language of order indicates to contrary and that court agreed to verdict against his own judgment and against dictates of his own conscience, merely because he did not feel that he had duty or authority to override findings of jury upon disputed issues of fact. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E. 236 (1944).

Damages rules and new trial rules exist independently. — Rules of law governing (1) right of jury to originally fix damages, (2) right of appellate court to grant new trial where verdict is alleged to be excessive or

inadequate, and (3) right of trial judge to grant new trial where in his discretion he thinks the verdict unfair, unjust, contrary to evidence, excessive, or too small, exist apart from and independent of each other. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E. 236 (1944).

Approval of verdict necessary to finalize it where party moves for new trial on general grounds. — Before verdict becomes final it should, where losing party requires it by motion for new trial, receive approval of mind and conscience of trial judge. Until his approval is given, verdict does not become binding in case where motion for new trial contains general grounds. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

New trial may be granted on condition that plaintiff refuses to agree to reduction in verdict. *Bank of Oglethorpe v. Hicks*, 15 Ga. App. 92, 82 S.E. 635 (1914); *Carter v. Virginia-Carolina Chem. Co.*, 144 Ga. 488, 87 S.E. 415 (1915); *Biggers v. Mathews*, 144 Ga. 857, 88 S.E. 190 (1916).

Party may be eliminated by order of appellate court, so judgment is against other defendant. *Lovell v. Frankum*, 24 Ga. App. 261, 100 S.E. 575 (1919).

Motion for new trial cannot be used to withdraw guilty plea. — One who has filed plea of guilty in criminal case cannot move for new trial; neither before nor after sentence can a motion for a new trial be employed as a means of withdrawing a plea of guilty. *Bearden v. State*, 13 Ga. App. 264, 79 S.E. 79 (1913) (decided under former Penal Code 1910, § 1083).

Effect of judge's condemnatory language during sentencing. — Disqualification to render judgment on motion for new trial does not result from judge's use of language condemnatory of the accused, when imposing sentence. *Harrison v. State*, 20 Ga. App. 157, 92 S.E. 970 (1917) (decided under former Penal Code 1910, § 1083).

Restriction on superior court's jurisdiction on appeal from probate proceeding. — Where appellant filed a motion in probate court to set aside or amend the probate of a will due to newly discovered evidence of a later will, the probate court properly dismissed the petition for lack of jurisdiction where the appellant was not a party to the original probate; on appeal, the jurisdiction

of the superior court was limited to that of the probate court. *In re Lott*, 171 Ga. App. 25, 318 S.E.2d 688 (1984).

Juvenile courts are without the power given to superior, state, and city courts by this Code section to consider and grant new trials. *In re J.O.*, 191 Ga. App. 521, 382 S.E.2d 214 (1989).

A motion for new trial may not be used to attack an order of the juvenile court, inasmuch as a juvenile court has no authority to consider or grant new trials. *In re M.A.L.*,

202 Ga. App. 768, 415 S.E.2d 649, cert. denied, 202 Ga. App. 906, 415 S.E.2d 649 (1992).

Cited in *Vance v. Gamble*, 95 Ga. 730, 22 S.E. 576 (1895); *Cowart v. Strickland*, 149 Ga. 397, 100 S.E. 447, 7 A.L.R. 1110 (1919); *City of Macon v. Herrington*, 198 Ga. 576, 32 S.E.2d 517 (1944); *Church of God of Union Ass'y, Inc. v. City of Dalton*, 216 Ga. 659, 119 S.E.2d 11 (1961); *Bowen v. Ball*, 215 Ga. App. 640, 451 S.E.2d 502 (1994).

OPINIONS OF THE ATTORNEY GENERAL

Probate courts do not have the authority to grant new trials. 1986 Op. Att'y Gen. No. U86-13.

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 11 et seq.

C.J.S. — 23 C.J.S., Criminal Law, §§ 1423-1427. 66 C.J.S., New Trial, §§ 1-12.

ALR. — Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded, 98 ALR 941; 29 ALR2d 1199.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion, 23 ALR2d 852.

Grant of new trial on issue of liability alone, without retrial of issue of damages, 34 ALR2d 988.

Delay as affecting right to coram nobis attacking criminal conviction, 62 ALR2d 432.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

ARTICLE 2

GROUND

Cross references. — Requirement that motions for new trial in civil cases be predicated upon intrinsic defect not appearing on face of record or pleadings, § 9-11-60. Those errors in admission or exclusion of evidence which will not constitute grounds for granting new trial, § 9-11-61.

Law reviews. — For articles discussing the preparation of an amended motion for new trial and facts concerning appellate practice in general, prior to the adoption of the Appellate Practice Act, see 21 Ga. B.J. 424 (1959).

JUDICIAL DECISIONS

Error and injury are prerequisites. — Legal error is a compound of both error and injury. In absence of either constituent element grant of new trial is not warranted. *Norris v. Sikes*, 102 Ga. App. 609, 117 S.E.2d 214 (1960).

Before new trial should be granted because of error committed on trial, not only error but injury must be shown. *Mills v. State*, 41 Ga. App. 834, 155 S.E. 104 (1930).

Ground of motion for new trial must be complete in itself. *Blakeney v. Bank of*

Hahira, 176 Ga. 190, 167 S.E. 114 (1932).

Each special ground of motion for new trial must be complete within itself; and when so incomplete as to require reference to brief of evidence, or to some other portion of record, in order to determine what was alleged error and whether such error was material, ground will not be considered by reviewing court. *Bray v. C.I.T. Corp.*, 51 Ga. App. 196, 179 S.E. 925 (1935).

A ground of a motion for new trial should be complete within itself, and Supreme Court will not look to other portions of record for purpose of supplementing it. *Gibson v. State*, 176 Ga. 384, 168 S.E. 47 (1933).

A ground of a motion for new trial should be complete within itself, and should not require resort to brief of evidence for a clear understanding of error it is claimed was committed. *Johnson v. Phoenix Mut. Life Ins. Co.*, 180 Ga. 422, 179 S.E. 95 (1935).

Extraordinary motions for new trial are not favored. *Smith v. State*, 171 Ga. 402, 155 S.E. 676 (1930).

Grounds of motion for new trial not approved as true without qualification cannot be considered. *Gay v. State*, 173 Ga. 793, 161 S.E. 603 (1931).

Where jury charge is based on unconstitutional statute. — Constitutionality of statute cannot be raised for first time in motion for new trial, but where charge is given to jury

based upon statute which is unconstitutional, and counsel could not know nor anticipate that substance of statute would be given in charge to jury, they were not bound to raise question of constitutionality of statute before charge was given, and could assign error upon charge in motion for new trial. *Wadley S. Ry. v. Faglee*, 173 Ga. 814, 161 S.E. 847 (1931).

Judge cannot modify verdict after its receipt and jury's disbursement. — If judge is not satisfied that verdict is returned is proper, before receiving verdict he may require jury to return to room and correct its verdict, under proper instructions from court or, after verdict is received and recorded and jury dispersed, he may grant new trial. But he is without power to change and modify verdict after it is received and recorded, and jury has dispersed. *Ballard v. Turner*, 147 Ga. App. 584, 249 S.E.2d 637 (1978).

Considered first grant where granted to party not previously awarded new trial. — Rule that first grant of new trial will not be disturbed, except where verdict is demanded by evidence, is applicable to case where two successive verdicts have been rendered, one for plaintiff and the other for defendant, and where in each instance a new trial was granted. *Schiefer v. Durden*, 56 Ga. App. 167, 192 S.E. 388 (1937).

Cited in *Cook v. Attapulugus Clay Co.*, 52 Ga. App. 610, 184 S.E. 334 (1936).

RESEARCH REFERENCES

ALR. — Inability to perfect record for appeal as ground for new trial, 13 ALR 102; 16 ALR 1158; 107 ALR 603.

Communications between jurors and others as ground for new trial or reversal in criminal case, 22 ALR 254; 34 ALR 103; 62 ALR 1466.

Violation of court rule by trial court as ground for reversal or new trial, 23 ALR 52.

New trial or reversal because of discussion or consideration of personal experiences of jurors bearing on issues in civil case, 46 ALR 1509.

Right of court, under its inherent power to grant a new trial, to disregard statute limiting time for filing or determining motion for new trial, 48 ALR 362.

Right of jurors to sustain their verdict by

affidavits or testimony to effect that they were not influenced by improper matters which came before them, 93 ALR 1449.

Acceptance of probation, parole, or suspension of sentence as waiver of error or right to appeal or to move for new trial, 117 ALR 929.

Running of limitations against proceeding to renew or revive judgment as affected by appeal or right of appeal from judgment, or by motion or right to move for new trial, 123 ALR 565.

Attempt to bribe juror as ground for new trial or reversal, 126 ALR 1260.

Grant of new trial, or reversal of judgment on appeal as to one joint tort-feasor, as requiring new trial or reversal as to other tort-feasor, 143 ALR 7.

Manifestation of emotion by party during civil trial as ground for mistrial, reversal, or new trial, 69 ALR2d 954.

Prior service on grand jury which considered indictment against accused as disqualification for service on petit jury, 24 ALR3d 1236.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence, or reflecting on integrity or intelligence of jurors, 41 ALR3d 1154.

Recantation by prosecuting witness in sex crime as ground for new trial, 51 ALR3d 907.

Propriety of, or prejudicial effect of omitting or giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 ALR3d 866.

Judgment favorable to convicted criminal defendant in subsequent civil action arising out of same offense as ground for reversal of conviction, 96 ALR3d 1174.

Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial, 50 ALR4th 995.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 ALR4th 1049.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases, 70 ALR4th 664.

5-5-20. Verdict contrary to evidence and justice.

In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury. (Laws 1799, Cobb's 1851 Digest, p. 503; Code 1863, § 3637; Code 1868, § 3662; Code 1873, § 3713; Code 1882, § 3713; Civil Code 1895, § 5477; Penal Code 1895, § 1057; Civil Code 1910, § 6082; Penal Code 1910, § 1084; Code 1933, § 70-202.)

Law reviews. — For survey of cases dealing with criminal law and criminal procedure

from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JUDGMENT NOTWITHSTANDING VERDICT

APPLICATION

1. IN GENERAL

2. ADEQUACY OF DAMAGES

APPEAL FROM DENIAL OF NEW TRIAL

General Consideration

Section furnishes exact rule by which verdict is to be measured; by it a verdict is either right or wrong. *Richmond & D.R.R. v. Allison*, 89 Ga. 567, 16 S.E. 116 (1892).

Damages rules and new trial rules exist independently. — Rules of law governing (1) right of jury to originally fix damages, (2) right of appellate court to grant new trial where verdict is alleged to be excessive or inadequate, and (3) right of trial judge to grant new trial where in his discretion he

thinks verdict "unfair, unjust, contrary to evidence, excessive, or too small," exist apart from and independent of each other. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Duty of trial judge to exercise discretion.

— Motion for new trial on grounds set forth in this section or § 5-5-21 addresses sound legal discretion of trial judge and the law imposes upon him the duty of exercising this discretion. *Kendrick v. Kendrick*, 218 Ga. 460, 128 S.E.2d 496 (1962); *Ricketts v. Will-*

iams, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Motion for new trial addresses only errors of law and fact contributing to rendition of verdict; it does not pertain to motion to vacate judgment. *Insurance Co. of N. Am. v. Eunice*, 111 Ga. App. 135, 140 S.E.2d 918 (1965).

General ground that verdict is contrary to evidence means verdict lacks evidence to support it. *Hardwick v. Georgia Power Co.*, 100 Ga. App. 38, 110 S.E.2d 24 (1959).

Approval of verdict necessary to finalize it. — Before verdict becomes final it should, where losing party requires it by motion for new trial, receive approval of mind and conscience of trial judge. Until his approval is given, verdict does not become binding in case where motion for new trial contains general grounds. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Grounds for new trial known but omitted at time of motion cannot be raised in subsequent petition. — Where, in former suit between same parties and relating to same subject matter, verdict was rendered against party, whose motion for new trial was afterwards voluntarily dismissed, a petition subsequently brought by such party to review and set aside verdict is properly dismissed on general demurrer (now motion to dismiss), where it appears that grounds for review were such as were known, or could by reasonable diligence have been discovered in time to incorporate them in motion for new trial made in former case. *Hubbard v. Whatley*, 200 Ga. 751, 38 S.E.2d 738 (1946).

Denial of new trial is in trial judge's discretion. — The denial of a new trial on the ground that the verdict is contrary to the evidence addresses itself only to the discretion of the trial judge. *Witt v. State*, 157 Ga. App. 564, 278 S.E.2d 145 (1981).

Cited in *Holland v. Williams*, 3 Ga. App. 636, 60 S.E. 331 (1908); *Western & Atl. R.R. v. Hughes*, 278 U.S. 496, 49 S. Ct. 231, 73 L. Ed. 473 (1929); *Candler v. Smith*, 50 Ga. App. 667, 179 S.E. 395 (1935); *Davis v. State*, 202 Ga. 13, 41 S.E.2d 414 (1947); *Harper v. Hall*, 76 Ga. App. 441, 46 S.E.2d 201 (1948); *Devereaux v. State*, 76 Ga. App. 498, 46 S.E.2d 528 (1948); *Doyle v. Dyer*, 77 Ga. App. 266, 48 S.E.2d 488 (1948); *Lasseter v. Griffin*,

77 Ga. App. 429, 49 S.E.2d 142 (1948); *City of Griffin v. Southeastern Textile Co.*, 79 Ga. App. 420, 53 S.E.2d 921 (1949); *Nance v. State*, 84 Ga. App. 777, 66 S.E.2d 273 (1951); *Foster v. Jones*, 208 Ga. 320, 66 S.E.2d 743 (1951); *Hight v. Steely*, 86 Ga. App. 137, 70 S.E.2d 886 (1952); *Garland v. Green*, 209 Ga. 424, 73 S.E.2d 187 (1952); *Hamilton v. State*, 89 Ga. App. 159, 78 S.E.2d 875 (1953); *Whitfield v. Washburn Storage Co.*, 99 Ga. App. 708, 109 S.E.2d 865 (1959); *Hamby v. Hamby*, 99 Ga. App. 808, 110 S.E.2d 133 (1959); *Cohen v. Gotlieb*, 108 Ga. App. 122, 132 S.E.2d 93 (1963); *Rackard v. Merritt*, 114 Ga. App. 743, 152 S.E.2d 701 (1966); *Pinkerton & Laws Co. v. Atlantis Realty Co.*, 128 Ga. App. 662, 197 S.E.2d 749 (1973); *Faulkner v. Western Elec. Co.*, 98 F.R.D. 282 (N.D. Ga. 1983); *Southeast Grading, Inc. v. Grissom-Harrison Corp.*, 171 Ga. App. 298, 319 S.E.2d 121 (1984); *Crump v. State*, 183 Ga. App. 43, 357 S.E.2d 863 (1987); *Glenridge Unit Owners Ass'n v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987); *Powell v. State*, 185 Ga. App. 464, 364 S.E.2d 599 (1988); *Stinson v. State*, 185 Ga. App. 543, 364 S.E.2d 910 (1988); *Towns v. State*, 185 Ga. App. 545, 365 S.E.2d 137 (1988).

Judgment Notwithstanding Verdict

New trial may be granted without demanding judgment n.o.v. for weight of evidence may be on one side, yet there is some to the contrary. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Motion for judgment n.o.v. may be denied without precluding grant of new trial; for though there may be some evidence in its favor, verdict may still be against weight of evidence. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Denial of new trial on general grounds, unexcepted to, precludes judgment notwithstanding verdict on appeal. — When trial judge denies motion for new trial on general grounds, he finds that verdict is not against weight of evidence and therefore, of necessity, that there is evidence to support the verdict. That determination being unexcepted to, the law of the case is established and appellate court cannot find on motion for judgment n.o.v. that there is no evidence to support verdict or that evidence demands verdict for movant. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Judgment Notwithstanding Verdict (Cont'd)

Effect of motion for judgment notwithstanding verdict where some evidence supports verdict. — Where there is any evidence supporting verdict, grounds of motion for judgment notwithstanding verdict, that such verdict was contrary to evidence and contrary to principles of justice and equity, merely invoke discretion of trial court on question of whether new trial should be granted on weight of evidence. *Crosby Aeromarine, Inc. v. Hyde*, 115 Ga. App. 836, 156 S.E.2d 106 (1967).

Application

1. In General

In first grant of new trial, trial judge has broad discretion. *Garrett v. Garrett*, 128 Ga. App. 594, 197 S.E.2d 739 (1973).

Denial of new trial becomes law of case as to grounds contained in motion. — Absent specific appeal from ruling on motion for new trial or enumerating same as error, denial of motion becomes law of case as to all grounds contained therein. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Grant of new trial under section does not create statutory double jeopardy bar. — Grant of new trial under this section or § 5-5-21 does not result in statutory double jeopardy bar under § 16-1-8(d)(2). *Ricketts v. Williams*, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Successful motion precludes later plea of former jeopardy. — Motion for new trial if granted at trial level is a forfeiture of any right to plead former jeopardy because of grant of new trial. *Ricketts v. Williams*, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

If no evidence supports finding, new trial must be granted. *Branch v. Anderson*, 47 Ga. App. 858, 171 S.E. 771 (1933).

Overruling general grounds of motion is proper where some evidence supports verdict. — Where trial judge has exercised discretion vested in him by law, and there is some evidence to support verdict, judgment overruling general grounds of motion for

new trial is not error. *Kendrick v. Kendrick*, 218 Ga. 460, 128 S.E.2d 496 (1962).

When motion for new trial denied. — It is correct for the trial court to deny a motion for new trial where it cannot be said that the verdict of the jury was contrary to the evidence and without evidence to support it. *Hill Aircraft & Leasing Corp. v. Tyler*, 161 Ga. App. 267, 291 S.E.2d 6 (1982).

If any evidence supports finding of jury, and no error otherwise committed, verdict will stand. *Bill Jones Motors, Inc. v. Mitchell*, 100 Ga. App. 185, 110 S.E.2d 555 (1959).

In determining whether there is any evidence supporting verdict, conflicts are resolved to favor verdict. *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

It is not error to refuse new trial if verdict is supported by evidence. *Hornbuckle v. State*, 76 Ga. App. 111, 45 S.E.2d 98 (1947).

Where second trial necessary anyway. — New trial is inappropriate where same verdict and judgment will necessarily result on second trial. *Georgia Power Co. v. City of Decatur*, 181 Ga. 187, 182 S.E. 32 (1935), aff'd sub nom. *Georgia Ry. & Elec. Co. v. City of Decatur*, 297 U.S. 620, 56 S. Ct. 606, 80 L. Ed. 925 (1936).

Where evidence authorizes verdict for either party. — Where transcript contains evidence which, if believed by jury, was quite sufficient to authorize verdict, it is of no moment that evidence would also have authorized verdict in some amount for plaintiff since jury weighed evidence and made its choice which is its duty and its function. *Daniels v. Hartley*, 120 Ga. App. 294, 170 S.E.2d 315 (1969).

Verdict contrary to law and issues raised by pleadings. — That verdict is contrary to law and contrary to issues made by pleadings is question which may be raised by motion for new trial. *Hubbard v. Whatley*, 200 Ga. 751, 38 S.E.2d 738 (1946).

Verdict in favor of party whose evidence does not correspond with pleadings justifies new trial. *Western & Atl. R.R. v. Hunt*, 116 Ga. 448, 42 S.E. 785 (1902).

Fact that verdict is large will not prevent approval if any evidence supports it. *Southern Ry. v. Brock*, 132 Ga. 858, 64 S.E. 1083 (1909).

Verdict in amount within range covered by testimony will not be set aside as un-

ported by evidence, though it may not correspond with contentions of either party. *Langston v. Langston*, 42 Ga. App. 143, 155 S.E. 494 (1930).

2. Adequacy of Damages

Determination is within discretion of trial court. — Determination of question as to whether verdict for damages is inadequate in legal sense, lies within sound discretion of trial court. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Mere difference of opinion as to amount of recovery. — New trial should not be granted based on mere difference of opinion between appellate court and jury as to amount of recovery in action of tort for unliquidated damages. Something more must be disclosed to warrant interference, where substantial damages have been returned. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Bias, passion, prejudice, or mistake must appear to justify setting aside. — Where amount of verdict, though less than appellate court would have approved, did not afford such evidence of bias, passion, prejudice, or mistake as to justify setting it aside as inadequate, appellate court must affirm it. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Where he can conscientiously acquiesce in verdict, trial judge should approve it. — If trial court can conscientiously acquiesce in amount of verdict, though it may not exactly accord with his best judgment or though some other finding might seem somewhat more satisfactory to his mind, and if his sense of justice is reasonably satisfied, he should, in absence of some material error of law affecting trial, approve it, and appellate court will uphold him in so doing, and will not say that he abused his discretion. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Inadequacy of damages for pain and suffering. — Amount of damages returned by jury in verdict, for pain and suffering, sustained because of alleged negligence, being governed by no other standard than enlightened conscience of impartial jurors, the question of inadequacy of verdict is not one which can be raised by general grounds in motion for new trial. *Trammell v. Atlanta Coach Co.*, 51 Ga. App. 705, 181 S.E. 315

(1935); *Brown v. Garcia*, 154 Ga. App. 837, 270 S.E.2d 63 (1980).

Appeal from Denial of New Trial

Appellate court does not have same discretion as trial judge who approved verdict. *Southern Ry. v. Brock*, 132 Ga. 858, 64 S.E. 1083 (1909).

Supreme Court does not have discretion to grant new trial on grounds enumerated in section; it can only review evidence to determine if there is any evidence to support verdict. *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

Appellate courts have no discretion regarding new trials for verdict against weight of evidence. *Gledhill v. Brown*, 44 Ga. App. 670, 162 S.E. 824 (1932).

Trial judge's discretion regarding adequacy of damages, will not be interfered with by appellate courts absent manifest abuse. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Where trial judge refuses to order new trial on ground of inadequate damages in tort action, this court will interfere with that discretion only in case of manifest abuse. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

First grant of new trial is not normally reviewable by appellate courts. — Ruling on motion for new trial under this section or § 5-5-21 does not amount to any ruling on evidence as a matter of law, and as a result, first grant of new trial is not normally reviewable by appellate courts. *Ricketts v. Williams*, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Appellate courts are powerless to interfere with first grant of new trial unless verdict set aside was demanded. *Garrett v. Garrett*, 128 Ga. App. 594, 197 S.E.2d 739 (1973).

First grant of new trial to either party will never be reversed by appellate courts, unless verdict set aside by trial judge was absolutely demanded. *Gledhill v. Brown*, 44 Ga. App. 670, 162 S.E. 824 (1932).

Where trial judge discharges duty to review evidence, Supreme Court cannot review factual issues. — When trial judge has discharged his duty to review evidence, Supreme Court has no power under Constitution to pass judgment on issues of fact made

Appeal from Denial of New Trial (Cont'd)

by evidence. *Merritt v. State*, 190 Ga. 81, 8 S.E.2d 386 (1940).

Presumption that trial judge knew rule as to obligation to approve jury's verdict. — In interpreting language of order overruling motion for new trial, appellate court must presume that trial judge knew rule as to obligation to approve jury's verdict devolving upon him, and that in overruling motion he did exercise this discretion, unless language of order indicates to contrary and that court agreed to verdict against his own judgment and against dictates of his own conscience, merely because he did not feel that he had duty or authority to override findings of jury upon disputed issues of fact. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Where there is doubt, appellate courts must decide in favor of verdicts. *Branch v. Anderson*, 47 Ga. App. 858, 171 S.E. 771 (1933).

Appellate court cannot set aside verdict on general grounds trial judge could have relied upon. — In considering case in which verdict of jury has approval of trial judge, appellate court is without power to set verdict aside on general grounds upon which trial judge, in exercise of discretion vested in him, might have set it aside. *Gledhill v. Brown*, 44 Ga. App. 670, 162 S.E. 824 (1932).

Appeal from denial of new trial on general grounds raises question whether evidence supported verdict. — Where appeal is from judgment denying party's motion for new trial and motion is based solely on general grounds, only query for reviewing court is whether evidence supported verdict. *Daniels v. Hartley*, 120 Ga. App. 294, 170 S.E.2d 315 (1969).

Any of general grounds for new trial are addressed to the discretion of the trial judge and on appeal these general grounds pose the sole question, was there any evidence to support verdict. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Setting aside verdict evidentiary grounds.

— Court of Appeals can set aside verdict on evidentiary grounds only where totally unsupported. Court of Appeals was established to correct errors of law, and can only set verdict aside, on evidentiary grounds, as being contrary to law, in that it lacks any

evidence by which it could be supported. *Gledhill v. Brown*, 44 Ga. App. 670, 162 S.E. 824 (1932).

Where verdict is supported by some evidence and is approved by trial court, Court of Appeals is without authority to interfere. *McDowell v. State*, 78 Ga. App. 116, 50 S.E.2d 633 (1948); *Humphries v. State*, 78 Ga. App. 139, 50 S.E.2d 799 (1948); *Newsome v. State*, 78 Ga. App. 332, 50 S.E.2d 828 (1948).

In passing upon general grounds of motion for new trial, appellate court will not disturb trial court's refusal to grant new trial if there is any evidence to support judgment. *Hopkins v. Sicro*, 107 Ga. App. 691, 131 S.E.2d 243 (1963).

Where verdict is supported by some evidence and it has approval of trial judge, it will not be disturbed by appellate court as to general grounds of motion for new trial. *Western & Atl. R.R. v. Fowler*, 77 Ga. App. 206, 47 S.E.2d 874 (1948).

Although evidence might authorize different verdict, where there is enough to support verdict found, judgment of trial court refusing new trial on general grounds will not be disturbed. *Wright v. State*, 76 Ga. App. 483, 46 S.E.2d 516 (1948); *Marcus v. State*, 76 Ga. App. 581, 46 S.E.2d 770 (1948); *Ramer v. State*, 76 Ga. App. 678, 47 S.E.2d 174 (1948); *Whitfield v. Wheeler*, 76 Ga. App. 857, 47 S.E.2d 658 (1948), overruled on other grounds, *Caskey v. Underwood*, 89 Ga. App. 418, 79 S.E.2d 558 (1953).

Verdict of jury which has approval of trial judge will not be set aside by Court of Appeals if it is supported by any evidence. *Branch v. Anderson*, 47 Ga. App. 858, 171 S.E. 771 (1933).

While appellate division of Municipal Court of Atlanta may, as any other court of review, grant new trial when there is no evidence to support verdict, where there was some evidence on which verdict could be based, and such verdict had approval of trial judge, appellate division of Municipal Court of Atlanta erred in granting new trial. *Turner v. Masonic Relief Ass'n*, 52 Ga. App. 374, 183 S.E. 350 (1936).

Denial of motion for new trial not to be interfered with absent abuse of discretion.

— Denial of ordinary motion for new trial, like denial of extraordinary motion, when based upon conflicting evidence, will not be corrected absent abuse of discretion.

Sumner v. Sumner, 186 Ga. 390, 197 S.E. 833 (1938).

Where evidence supports judgment rendered without jury. — Where evidence is sufficient to support judgment of court trying case by agreement without intervention of jury, on motion for new trial, same will not be disturbed by appellate court. *Carter v. State*, 77 Ga. App. 60, 47 S.E.2d 815 (1948).

Function of appellate court in reviewing verdict. — Barring error by the trial court, the jury's verdict must be upheld unless it can be shown that there is no substantial evidence to support it, considering the evidence in the light most favorable to appellees, and clothing it with all reasonable inferences to be deduced therefrom. Thus, the United States Court of Appeals' sole

function is to ascertain if there is a rational basis in the record for the jury's verdict. *Columbus Bank & Trust Co. v. Cohn*, 644 F.2d 1040 (5th Cir. 1981).

Evidence viewed in light most favorable to upholding verdict. — It is of no consequence on review of the denial of a motion for new trial based on the sufficiency of the evidence that the evidence adduced at trial would have authorized a verdict for either party. A reviewing court must view the evidence in a light most favorable to upholding the jury's verdict and any evidence which supports the jury's verdict is sufficient to sustain the trial court's denial of a motion for new trial based on the sufficiency of the evidence. *Clark v. United Ins. Co. of Am.*, 199 Ga. App. 1, 404 S.E.2d 149 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 371 et seq.

C.J.S. — 23 C.J.S., Criminal Law, §§ 1444, 1445. 66 C.J.S., New Trial, §§ 68-77.

ALR. — Abuse of witness by counsel as ground for new trial or reversal, 4 ALR 414.

Power of court to reduce or increase verdict without giving party affected the option to submit to a new trial, 53 ALR 779; 95 ALR 1163.

Power of trial court to dismiss defendant in criminal case for insufficiency of evidence after submitting case to jury or after verdict of guilty, 131 ALR 187.

Court's power to grant new trial as to both defendants, over their objection, because of verdict holding employer and absolving employee for latter's negligence, 16 ALR2d 969.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded, 29 ALR2d 1199.

Prejudicial effect of misconduct by one other than juror during authorized view by jury in civil case, 45 ALR2d 1128.

Verdict for money judgment which finds for party for ambiguous or no amount, 49 ALR2d 1328.

Disclosure in criminal case of juror's political, racial, religious, or national origin prejudice against accused or witnesses as ground for new trial or reversal, 91 ALR2d 1120.

Discussion, during jury deliberation, of possible insurance coverage as prejudicial misconduct, 47 ALR3d 1299.

Standard for granting or denying new trial in state criminal case on basis of recanted testimony—modern cases, 77 ALR4th 1031.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

5-5-21. Verdict against weight of evidence.

The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding. (Ga. L. 1853-54, p. 46, § 3; Code 1863, § 3641; Code 1868, § 3666; Code 1873, § 3717; Code 1882, § 3717; Civil Code 1895, § 5482; Penal Code 1895, § 1058; Civil Code 1910, § 6087; Penal Code 1910, § 1085; Code 1933, § 70-206.)

Law reviews. — For survey of cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JUDGMENT NOTWITHSTANDING VERDICT

APPLICATION

APPEAL OR CERTIORARI FROM DENIAL OF NEW TRIAL

General Consideration

General grounds for new trial are addressed to discretion of trial judge. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Discretion rests solely with trial judge. — Discretion to grant or refuse motions for new trials because verdict is strongly and decidedly against weight of evidence rests solely in presiding judge. *Gledhill v. Brown*, 44 Ga. App. 670, 162 S.E. 824 (1932); *Turner v. Masonic Relief Ass'n*, 52 Ga. App. 374, 183 S.E. 350 (1936).

Trial judge alone has the authority to grant new trial on ground that verdict is strongly and decidedly against weight of evidence. *Josey v. State*, 197 Ga. 82, 28 S.E.2d 290 (1943); *Wright v. State*, 173 Ga. App. 408, 326 S.E.2d 584 (1985); *Hood v. State*, 192 Ga. App. 150, 384 S.E.2d 242 (1989); *Dixon v. State*, 192 Ga. App. 845, 386 S.E.2d 719 (1989); *Madaris v. State*, 207 Ga. App. 145, 427 S.E.2d 110 (1993).

Duty upon trial judge to exercise discretion. — Motion for a new trial on grounds set forth in this section and § 5-5-20 addresses sound legal discretion of trial judge and law imposes upon him the duty of exercising this discretion. *Kendrick v. Kendrick*, 218 Ga. 460, 128 S.E.2d 496 (1962); *Ricketts v. Williams*, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Discretion to grant new trials should be exercised with caution. *Ricketts v. Williams*, 242 Ga. 303, 248 S.E.2d 673 (1978), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

New trial should be granted only where evidence preponderates heavily against verdict. — Power to grant new trial under this section should be invoked only in excep-

tional cases in which evidence preponderates heavily against verdict. *Ricketts v. Williams*, 242 Ga. 303, 248 S.E.2d 673 (1978), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Discretion duty applies no matter how many verdicts have gone against movant. — In all cases where motion for new trial is being passed on by trial judge, no matter how many verdicts have gone against losing party, law places on him a solemn responsibility to exercise discretion in granting or refusing new trial. *Mills v. State*, 188 Ga. 616, 4 S.E.2d 453 (1939).

On motion for new trial, court may weigh evidence and consider credibility of witnesses. If court reaches conclusion that verdict is contrary to weight of evidence and that miscarriage of justice may have resulted, verdict may be set aside and new trial granted. *Ricketts v. Williams*, 242 Ga. 303, 248 S.E.2d 673 (1978), cert. denied, 439 U.S. 1135, 99 S. Ct. 1059, 59 L. Ed. 2d 97 (1979).

All conflicts are resolved to favor verdict in determining whether there is any evidence supporting the verdict. *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

After verdict, in passing upon motion for new trial, that view of evidence which is most unfavorable to accused must be taken, for every presumption and every inference is in favor of the verdict. *Brown v. State*, 71 Ga. App. 522, 31 S.E.2d 85 (1944).

Cited in *Richmond & D.R.R. v. Allison*, 89 Ga. 567, 16 S.E. 116 (1892); *Western & Atl. R.R. v. Hughes*, 278 U.S. 496, 49 S. Ct. 231, 73 L. Ed. 473 (1929); *Jackson Dist. Co. v. Merck*, 50 Ga. App. 381, 178 S.E. 208 (1935); *Candler v. Smith*, 50 Ga. App. 667, 179 S.E. 395 (1935); *Rogers v. Rogers*, 52 Ga. App. 548, 184 S.E. 404 (1936); *Southern Ry. v. Lunsford*, 57 Ga. App. 53, 194 S.E. 602

(1937); *Carter v. Powell*, 57 Ga. App. 360, 195 S.E. 466 (1938); *Davis v. State*, 202 Ga. 13, 41 S.E.2d 414 (1947); *Halliburton v. Collier*, 75 Ga. App. 316, 43 S.E.2d 339 (1947); *Law v. State*, 92 Ga. App. 604, 89 S.E.2d 550 (1955); *Martin v. State*, 95 Ga. App. 519, 98 S.E.2d 105 (1957); *O'Quinn v. James*, 127 Ga. App. 94, 192 S.E.2d 507 (1972); *Kramer v. Hopper*, 234 Ga. 395, 216 S.E.2d 119 (1975); *Wilson v. State*, 145 Ga. App. 33, 243 S.E.2d 304 (1978); *Hembree v. Ideal Bldrs., Inc.*, 158 Ga. App. 574, 281 S.E.2d 328 (1981); *Johnson v. Wills Mem. Hosp. & Nursing Home*, 178 Ga. App. 459, 343 S.E.2d 700 (1986); *Crump v. State*, 183 Ga. App. 43, 357 S.E.2d 863 (1987); *Glenridge Unit Owners Ass'n v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987); *Stinson v. State*, 185 Ga. App. 543, 364 S.E.2d 910 (1988); *Towns v. State*, 185 Ga. App. 545, 365 S.E.2d 137 (1988); *Hart v. Fortson*, 263 Ga. 389, 435 S.E.2d 45 (1993); *Willis v. State*, 263 Ga. 597, 436 S.E.2d 204 (1993); *United Servs. Auto. Ass'n v. Gottschalk*, 212 Ga. App. 88, 441 S.E.2d 281 (1994); *Harper v. State*, 213 Ga. App. 611, 445 S.E.2d 300 (1994).

Judgment Notwithstanding Verdict

A new trial may be granted without demanding a judgment n.o.v. for the weight of evidence may be on one side, yet there be some to the contrary. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Motion for judgment n.o.v. may be denied without precluding grant of new trial; for though there may be some evidence, verdict may still be against weight of evidence. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Denial of new trial on general grounds unexcepted to preclude judgment notwithstanding verdict on appeal. — When trial judge denies motion for new trial on general grounds, he finds that verdict is not against weight of evidence and therefore, of necessity, that there is evidence to support the verdict. That determination being unexcepted to, the law of the case is established and appellate court cannot find on motion for judgment n.o.v. that there is no evidence to support verdict or that evidence demands verdict for movant. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Application

Jury's fact finding not final until verdict approved where motion for new trial is made. — No finding of fact by jury is final or conclusive when motion for new trial is presented; unless and until that verdict is approved by trial judge. *Mills v. State*, 188 Ga. 616, 4 S.E.2d 453 (1939).

Denial of new trial becomes law of case. — Absent specific appeal from ruling on motion for new trial or enumerating same as error, denial of motion becomes law of case as to all grounds contained therein. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

No double jeopardy bar. — Grant of new trial under this section or § 5-5-20 does not result in statutory double jeopardy bar under § 16-1-8(d)(2). *Ricketts v. Williams*, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Successful motion for new trial at trial level, precludes later plea of former jeopardy. — Motion for new trial, if granted at trial level, is a forfeiture of any right to plead former jeopardy because of grant of new trial. *Ricketts v. Williams*, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Grant of new trial under section not same as finding evidence legally insufficient. — Grant of new trial by trial court on ground that verdict is against weight of evidence under this section, does not amount to a finding that evidence is legally insufficient, and does not thereby bar a second trial under double jeopardy clause of the U.S. Constitution. *Ricketts v. Williams*, 242 Ga. 303, 248 S.E.2d 673 (1978), cert. denied, 439 U.S. 1135, 99 S. Ct. 1059, 59 L. Ed. 2d 97 (1979).

Distinction between legally insufficient evidence and verdict against weight of evidence. — There is a distinction at law between a decision holding the evidence legally insufficient and discretionary decision of trial court that verdict is against weight of evidence. *Ricketts v. Williams*, 242 Ga. 303, 248 S.E.2d 673 (1978), cert. denied, 439 U.S. 1135, 99 S. Ct. 1059, 59 L. Ed. 2d 97 (1979).

Where some evidence supports verdict. — Where trial judge has exercised discretion

Application (Cont'd)

vested in him by law, and there is some evidence to support verdict, judgment overruling general grounds of motion for new trial is not error. *Kendrick v. Kendrick*, 218 Ga. 460, 128 S.E.2d 496 (1962).

Inadequacy of damages for pain and suffering. — Amount of damages returned by jury in verdict, for pain and suffering, sustained because of alleged negligence, being governed by no other standard than enlightened conscience of impartial jurors, the question of inadequacy of verdict is not one which can be raised by general grounds in motion for new trial. *Trammell v. Atlanta Coach Co.*, 51 Ga. App. 705, 181 S.E. 315 (1935); *Brown v. Garcia*, 154 Ga. App. 837, 270 S.E.2d 63 (1980).

Fact that verdict is generous is not basis for setting it aside. — Trial judge may exercise sound discretion in refusing new trial in case where verdict may be decidedly and strongly against weight of evidence, but a generous verdict will not be set aside merely for that reason. *Evans v. Caldwell*, 52 Ga. App. 475, 184 S.E. 440 (1936), *aff'd*, 184 Ga. 203, 190 S.E. 582 (1937).

Fact that verdict is large will not prevent approval if any evidence supports it. *Southern Ry. v. Brock*, 132 Ga. 858, 64 S.E. 1083 (1909).

Although plaintiff introduced more witnesses than defendant, judge's refusal of new trial is not error. *McGriff v. McGriff*, 154 Ga. 560, 115 S.E. 21 (1922).

Verdict in favor of party whose evidence does not correspond with pleadings justifies new trial. *Western & Atl. R.R. v. Hunt*, 116 Ga. 448, 42 S.E. 785 (1902).

Court refusal to accept verdict not abuse of discretion. — In action concerning a stock sales agreement, trial court did not abuse its discretion in declining to accept a jury verdict that required the defendant specifically to perform the agreement, but also recommended that bank balance and surplus stock in a warehouse be turned over to the defendant. *Brown v. Reeves*, 168 Ga. App. 403, 309 S.E.2d 654 (1983).

Court abuses discretion by refusing to set aside excessive award. — A trial judge fails to exercise the discretion vested in him by law when he agrees that the amounts awarded to the plaintiff by the jury are

excessive but refuses to set them aside or order a new trial on the basis that he does not want to impose his opinion upon the jury. *Story v. Monteith*, 176 Ga. App. 853, 338 S.E.2d 32 (1985), *rev'd* on other grounds, 255 Ga. 528, 341 S.E.2d 1 (1986).

Appeal or Certiorari From Denial of New Trial

Appellate court does not have same discretion as trial judge who approved verdict. *Southern Ry. v. Brock*, 132 Ga. 858, 64 S.E. 1083 (1909).

Supreme Court does not have discretion to grant new trial on grounds enumerated in section; it can only review evidence to determine if there is any evidence to support verdict. *Drake v. State*, 241 Ga. 583, 247 S.E.2d 57 (1978), *cert. denied*, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

Function of appellate court is to review sufficiency of evidence, not to determine its weight. Though evidence might have authorized a different verdict or verdict is supported by only slight evidence or evidence is conflicting or preponderates against verdict, where no material error of law appears, appellate court will not disturb trial judge's judgment in overruling motion for new trial. *McBowman v. Merry*, 104 Ga. App. 454, 122 S.E.2d 136 (1961).

Discretion of superior court, on certiorari, to grant new trial in lower court. — See *Deaton v. Taliaferro*, 80 Ga. App. 685, 57 S.E.2d 215 (1950).

First grant of new trial is not normally reviewable by appellate courts. — Ruling on a motion for new trial under this section or § 5-5-20 does not amount to any ruling on evidence as a matter of law, and as a result, first grant of new trial is not normally reviewable by appellate courts. *Ricketts v. Williams*, 240 Ga. 148, 240 S.E.2d 41 (1977), *vacated* on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

First grant of new trial to either party will never be reversed by appellate courts, unless verdict set aside by trial judge was absolutely demanded. *Gledhill v. Brown*, 44 Ga. App. 670, 162 S.E. 824 (1932).

Sole question on appeal from denial on general grounds. — On appeal of denial of motion for new trial based on general grounds, sole question for appellate court is whether there is any evidence to support

verdict. *Burnet v. Bazemore*, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Trial judge's denial of motion for new trial on evidentiary grounds will be reversed on appeal only if there is no evidence to support verdict. *Ricketson v. Fox*, 247 Ga. 162, 274 S.E.2d 556 (1981).

Appellate court will not disturb trial court's refusal to grant new trial if there is any evidence at all to support verdict, however slight, and regardless of what may be character of witnesses. *McBowman v. Merry*, 104 Ga. App. 454, 122 S.E.2d 136 (1961).

Appellate court cannot set aside verdict on general grounds trial judge could have relied upon. — In considering case in which verdict of jury has approval of trial judge,

appellate court is without power to set verdict aside on general grounds upon which trial judge, in exercise of discretion vested in him, might have set it aside. *Gledhill v. Brown*, 44 Ga. App. 670, 162 S.E. 824 (1932).

Appellate court cannot grant new trial if any evidence supports verdict. — While appellate division of Municipal Court of Atlanta may grant new trial where no evidence supports verdict, where there is some evidence on which verdict could be based, and such verdict has approval of trial judge, appellate division of Municipal Court of Atlanta erred in granting a new trial. *Turner v. Masonic Relief Ass'n*, 52 Ga. App. 374, 183 S.E. 350 (1936).

RESEARCH REFERENCES

C.J.S. — 23 C.J.S., Criminal Law, § 1445. 66 C.J.S., New Trial, §§ 69-73.

ALR. — Power of court to reduce or increase verdict without giving party affected the option to submit to a new trial, 53 ALR 779; 95 ALR 1163.

Power of trial court to dismiss defendant

in criminal case for insufficiency of evidence after submitting case to jury or after verdict of guilty, 131 ALR 187.

Court's power to grant new trial as to both defendants, over their objection, because of verdict holding employer and absolving employee for latter's negligence, 16 ALR2d 969.

5-5-22. Illegal admission or exclusion of evidence.

The courts may grant new trials in all cases when any material evidence may be illegally admitted to or illegally withheld from the jury over the objection of the movant. (Ga. L. 1853-54, p. 46, § 1; Code 1863, § 3638; Code 1868, § 3663; Code 1873, § 3714; Code 1882, § 3714; Civil Code 1895, § 5478; Penal Code 1895, § 1059; Civil Code 1910, § 6083; Penal Code 1910, § 1086; Code 1933, § 70-203.)

Cross references. — Evidence generally, T. 24.

Law reviews. — For article, "A Discussion

of the 1957 Amendments to Rules of Practice and Procedure in Georgia," see 19 Ga. B.J. 395 (1957).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ADMISSION OVER OBJECTION

1. IN GENERAL

2. APPLICATION

ERRONEOUS EXCLUSION OF EVIDENCE

OBJECTION

CONTENT OF MOTION

General Consideration

If evidence is admissible for any purpose, its admission will not cause a new trial. *West v. West*, 199 Ga. 378, 34 S.E.2d 545 (1945).

Test as to whether illegal evidence warrants new trial. — Error of admitting illegal evidence must be such as induced or largely contributed to erroneous finding, and such error that if new trial is granted, result should in all probability be different on another trial. *Daughtry v. Savannah & S. Ry.*, 1 Ga. App. 393, 58 S.E. 230 (1907).

Where evidence of guilt is overwhelming. — Where evidence is overwhelming that defendant is guilty, even errors in admission or rejection of testimony will not operate so as to require new trial. *Brannon v. State*, 21 Ga. App. 328, 94 S.E. 259 (1917), cert. denied, 21 Ga. App. 825 (1918). But see *Thigpen v. Batts*, 199 Ga. 161, 33 S.E.2d 424 (1945).

Where evidence rejected relates to matter collateral to main transaction, and evidence touching main transaction makes a clear case of guilt, rejection of such evidence does not in all cases require grant of new trial. *Green v. State*, 154 Ga. 117, 113 S.E. 536 (1922).

Ruling upon admissibility of testimony may be reversed by motion for new trial. *Eaves v. Field & Son*, 8 Ga. App. 69, 68 S.E. 556 (1910).

Admission of illegal testimony on one side will not justify illegal rebutting testimony on other. Two wrongs do not make a right. *Housing Auth. v. Kolokuris*, 110 Ga. App. 869, 140 S.E.2d 239 (1965).

Evidence not conforming to pleadings, admitted without objection. — Although pleadings may not present whole issue, if it is fully made by evidence without objection, it is too late, after verdict, for losing party, to make that the ground of a motion for new trial. *Metropolitan Life Ins. Co. v. Hale*, 47 Ga. App. 674, 171 S.E. 306 (1933).

Inadmissible testimony given on cross examination that is unresponsive to question. — While answer that is responsive to question on cross-examination will not be ruled out although it would otherwise have been inadmissible as evidence, testimony that is inadmissible, which is given on cross-examination but is not responsive to question, should be ruled out; and it is error to overrule motion to exclude it. *Mickle v.*

Moore, 188 Ga. 444, 4 S.E.2d 217 (1939).

Disposition of case on diminished record. — The trial court may not on motion for judgment notwithstanding the verdict eliminate evidence on the ground that it was improperly received at the trial and then dispose of the case on the basis of the diminished record. *Mays v. Daniels*, 179 Ga. App. 677, 347 S.E.2d 642 (1986).

Cited in *Campbell v. State*, 155 Ga. 127, 116 S.E. 807 (1923); *Evans v. Caldwell*, 52 Ga. App. 475, 184 S.E. 440 (1936), aff'd, 184 Ga. 203, 190 S.E. 582 (1937); *Harper v. Perry*, 190 Ga. 233, 9 S.E.2d 160 (1940); *Miller v. State*, 69 Ga. App. 847, 26 S.E.2d 851 (1943); *Edmonds v. State*, 201 Ga. 108, 39 S.E.2d 24 (1946); *Ludwig v. J.J. Newberry Co.*, 78 Ga. App. 871, 52 S.E.2d 485 (1949); *Hamel v. Elliott*, 79 Ga. App. 633, 54 S.E.2d 688 (1949); *McBerry v. Ivie*, 116 Ga. App. 808, 159 S.E.2d 108 (1967); *Fendley v. Weaver*, 121 Ga. App. 526, 174 S.E.2d 369 (1970); *Rowell v. State*, 122 Ga. App. 568, 177 S.E.2d 812 (1970); *Johnson v. Ervin*, 236 Ga. 605, 225 S.E.2d 21 (1976); *Stillman v. Tempo Carpets, Inc.*, 174 Ga. App. 66, 329 S.E.2d 197 (1985); *Odom v. Dekle*, 178 Ga. App. 788, 344 S.E.2d 675 (1986); *Joe N. Guy Co. v. Valiant Steel & Equip., Inc.*, 196 Ga. App. 20, 395 S.E.2d 310 (1990); *Payne v. Joyner*, 197 Ga. App. 527, 399 S.E.2d 83 (1990).

Admission Over Objection

1. In General

Where material and illegal evidence is improperly admitted, a new trial will be granted. *Cherry v. McCutchen*, 68 Ga. App. 682, 23 S.E.2d 587 (1942).

Where erroneously admitted evidence is harmful, its admission is ground for new trial. *Owens v. State*, 118 Ga. 753, 45 S.E. 598 (1903).

Harmless error in admission of evidence not ground for new trial. — While under § 24-9-70, objection may not be waived as to introduction of evidence on same subject matter through cross-examination or otherwise; nevertheless, new trial will not be granted for harmless error in admission of evidence. *Eiberger v. Martel Elec. Sales, Inc.*, 125 Ga. App. 253, 187 S.E.2d 327 (1972).

Admission of immaterial evidence without harmful effect is not a good ground for new

trial. *Cherry v. McCutchen*, 68 Ga. App. 682, 23 S.E.2d 587 (1942).

It is not reversible error to admit evidence that is merely irrelevant and immaterial. *Mickle v. Moore*, 188 Ga. 444, 4 S.E.2d 217 (1939); *McDaniel v. State*, 197 Ga. 757, 30 S.E.2d 612 (1944).

Admission of irrelevant testimony will not furnish ground for new trial unless it injuriously affected party making complaint. *Turbaville v. State*, 58 Ga. 545 (1877).

Rejection of testimony, admissible or inadmissible, which has no probative value whatever, or admitting legal testimony which is wholly immaterial, is not sufficient cause for granting a new trial. Because testimony has been inadvertently admitted, which is wholly immaterial, and which it is apparent could have helped neither party, a new trial will hardly be awarded in an important case. *Weeks v. State*, 79 Ga. 36, 3 S.E. 323 (1887).

Admission of irrelevant testimony, not affecting verdict, will not require new trial. *Purser v. McNair*, 153 Ga. 405, 112 S.E. 648 (1922).

Corrective instructions to rule out illegal testimony. — Ordinarily, when illegal testimony is placed in evidence, it is not an abuse of discretion to refuse to grant a mistrial if sufficient corrective instructions are given in ruling out the testimony. This is true even if the illegal testimony has the effect of placing the defendant's character in issue, especially when the testimony is volunteered by the witness and not directly elicited by the solicitor. *Witt v. State*, 157 Ga. App. 564, 278 S.E.2d 145 (1981); *Glenridge Unit Owners Ass'n v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987).

Erroneous admission of evidence over objection not reversible error where similar evidence is admitted without objection. *Davis v. Fulton Nat'l Bank*, 77 Ga. App. 400, 48 S.E.2d 773 (1948).

Where certain evidence is admitted over objection, but similar evidence to same effect is admitted without objection, admission of evidence objected to will not constitute reversible error, even if admission of evidence was erroneous. *Louisville & N.R.R. v. McCamy*, 72 Ga. App. 769, 35 S.E.2d 206 (1945).

Where jury considers evidence on same subject matter, admitted without objection, it is not harmful error to allow same evi-

dence again admitted, over objections, since it would probably not change result. *Eiberger v. Martel Elec. Sales, Inc.*, 125 Ga. App. 253, 187 S.E.2d 327 (1972).

Testimony, even though illegally admitted over proper objection, will not constitute reversible error where substantially same testimony is later introduced without objection. *Johnson v. State*, 84 Ga. App. 745, 67 S.E.2d 246 (1951).

Effect of ruling out illegally admitted evidence. — As a general rule, error in admitting illegal evidence is cured by subsequently ruling it out. This rule, however, is subject to exception; for where illegal evidence may have worked such harm or injury to accused as to render it probable that its subsequent withdrawal will not heal injury inflicted by its improper admission, error is sufficient ground for grant of a new trial. *Thompson v. State*, 12 Ga. App. 201, 76 S.E. 1072 (1913), see *McDonald v. State*, 72 Ga. 55 (1883).

2. Application

Erroneously admitted evidence, calculated to harm defendant. — Where it cannot be said that erroneously admitted evidence was not calculated to harm defendant and prejudice his cause, its admission is ground for new trial. *Brown v. State*, 119 Ga. 572, 46 S.E. 833 (1904); *Johnson v. State*, 128 Ga. 71, 57 S.E. 84 (1907).

Where illegal evidence impeaching credibility of party was admitted, a new trial was justified. *Jenkins v. Lane*, 154 Ga. 454, 115 S.E. 126 (1922).

Where opinion of plaintiff that he was damaged was admitted, new trial was justified. *Central R.R. & Banking Co. v. Kelley*, 58 Ga. 107 (1877).

Admission of expressions tending to mitigate rather than establish guilt, not ground for new trial. *Pines v. State*, 21 Ga. 227 (1857).

Admission of record of divorce between accused and deceased was not ground for new trial. *Lucas v. State*, 146 Ga. 315, 91 S.E. 72 (1916).

Admission of evidence in chief after state and defendant have closed is within court's discretion. *Cooper v. State*, 103 Ga. 63, 29 S.E. 439 (1897).

Admission of some hearsay or opinion evidence at interlocutory hearing. — Rules of evidence are not in all respects as rigidly

Admission Over Objection (Cont'd)**2. Application (Cont'd)**

enforced on interlocutory hearings as on final trials and admission of some hearsay or opinion evidence, will not necessarily require reversal. *Griffith v. City of Hapeville*, 182 Ga. 333, 185 S.E. 522 (1936).

Previously withheld exculpatory information. — If exculpatory information is withheld from a defendant prior to trial (after a proper motion to release all such evidence), but is later introduced at trial by the state, the defendant is not entitled to a mistrial unless he shows that his defense was thereby prejudiced and that he was denied a fair trial. *Edwards v. State*, 176 Ga. App. 369, 337 S.E.2d 27 (1985).

Erroneous Exclusion of Evidence**Necessary showing for exclusion of testimony to be considered ground for new trial.**

— For exclusion of oral testimony to be considered as ground for new trial, it must appear that pertinent question was asked, and that court ruled out answer and that a statement was made to court at time showing what answer would be; and that such testimony was material, and would have benefited complaining party. *Ellison v. State*, 21 Ga. App. 259, 94 S.E. 253 (1917).

Rejecting evidence tending to sustain defense. — When rejected evidence relates to main transaction and tends to sustain defense set up by defendant, rejection of such evidence requires grant of new trial. *Green v. State*, 154 Ga. 117, 113 S.E. 536 (1922).

Rejection of evidence partly admissible and partly inadmissible. — Where evidence, some of which is admissible, and some of which is not admissible, is offered as a whole, a new trial will not be granted because of its rejection. *Arnold v. State*, 131 Ga. 494, 62 S.E. 806 (1908).

Erroneous exclusion where record contains similar evidence establishing same fact. — Where certain evidence is excluded over objection, but record contains similar evidence establishing fact which it is sought to establish by evidence which has been excluded, such exclusion will not constitute reversible error, even if exclusion was erroneous. *Louisville & N.R.R. v. McCamy*, 72 Ga. App. 769, 35 S.E.2d 206 (1945).

Objection

Admission of illegal evidence without objection. — Where no objection is made to illegal evidence on trial of case its admission is not ground for new trial. *Weldon v. State*, 78 Ga. App. 530, 51 S.E.2d 605 (1949).

Where evidence is illegally admitted, a new trial may be granted, yet general rule is that specific ground of objection must be made at time evidence is offered. *Boggs v. Griffeth Bros. Tire Co.*, 125 Ga. App. 304, 187 S.E.2d 915 (1972).

It is not ground for new trial that illegal evidence was admitted when no objection was made to its introduction when offered, nor at any time anterior to rendition of verdict. *Licett v. State*, 23 Ga. 57 (1857); *Evans v. State*, 33 Ga. 1 (1861).

Where counsel for defendant expressly consents to admission of evidence, it will not thereafter serve as ground for new trial. *Williams v. State*, 119 Ga. 425, 46 S.E. 626 (1904).

Failure to make objection to admission of illegal evidence will be treated as a waiver and will prevent court, on motion for new trial from inquiring as to competency of such evidence. *Andrews v. State*, 118 Ga. 1, 43 S.E. 852 (1903); *Richardson v. State*, 141 Ga. 782, 82 S.E. 134 (1914); *Boggs v. Griffeth Bros. Tire Co.*, 125 Ga. App. 304, 187 S.E.2d 915 (1972).

Objection to evidence must specify ground upon which it is based. — Where objection to evidence does not state ground upon which it is based, error cannot be assigned upon overruling thereof; the ground must be specific, and must point out wherein and how admission of evidence would violate some recognized rule of the law of evidence. *Cooksey v. State*, 149 Ga. App. 572, 254 S.E.2d 892 (1979).

In order to raise on appeal contentions concerning admissibility of evidence the specific ground of objection must be made at the time the evidence is offered, and a failure to do so will be considered as a waiver. All evidence is admitted as a matter of course unless a valid ground of objection is interposed. *Eiberger v. West*, 165 Ga. App. 559, 301 S.E.2d 914 (1983).

Objection merely that evidence is inadmissible is equivalent to no objection. — Objection to admission of evidence upon ground merely that it is inadmissible is equivalent to

assigning no reason at all for its exclusion. *McDonald v. State*, 21 Ga. App. 125, 94 S.E. 262 (1917).

Objection necessary although judge previously promises to exclude testimony if connection with crime not established. — Where trial judge promises that certain testimony which counsel for accused moves to exclude, on ground that it does not connect accused with crime for which he is being tried, will be excluded unless such connection is shown, failure to make any subsequent motion to exclude it can be treated by court as waiver of objection, and failure to exclude it is not cause for new trial. *Quinn v. State*, 22 Ga. App. 632, 97 S.E. 84 (1918).

One cannot urge admission of evidence over objection of opposite party as ground for new trial. — After verdict it is too late for party who upon trial made no objection to testimony which was inadmissible or of no probative value, to urge for first time, as reason why new trial should be granted him, failure of judge to exclude such testimony upon motion of opposite party. His failure to object upon his own part, or to join in objection of his opponent will be construed as a waiver of all objection to it, and as a tacit admission that he considered it beneficial to his cause. *Wright v. State*, 6 Ga. App. 770, 65 S.E. 806 (1909).

Where part of evidence is admissible, objection to it as a whole may be overruled. *Dye v. State*, 77 Ga. App. 517, 48 S.E.2d 742 (1948).

While superior courts may grant new trials in accordance with this section, where objection is made to specified evidence as a whole, part of which is admissible and part inadmissible, and objection does not point out objectionable portion, there is no error in admitting entire evidence. *Jones v. Blackburn*, 75 Ga. App. 791, 44 S.E.2d 555 (1947).

Content of Motion

Motion for new trial must state nature of objection or objections made to admission of illegal evidence. *Licett v. State*, 23 Ga. 57 (1857); *Evans v. State*, 33 Ga. 1 (1861); *Reilly v. State*, 82 Ga. 568, 9 S.E. 332 (1889); *Brown v. State*, 105 Ga. 640, 31 S.E. 557 (1898); *Sable v. State*, 14 Ga. App. 816, 82 S.E. 379 (1914).

Ground of motion for new trial should be complete within itself. *Williamson v. Prather*, 188 Ga. 545, 4 S.E.2d 140 (1939).

Where motion does not clearly show admission of illegal evidence, new trial will be denied. *Anderson v. State*, 122 Ga. 161, 50 S.E. 46 (1905).

Must show that objection was made at time of exclusion complained of. — Supreme Court will not pass upon question of admissibility of evidence where ground in motion for new trial fails to show that objections for exclusion of evidence were urged before trial judge when evidence was offered. *Davis v. Buie*, 197 Ga. 835, 30 S.E.2d 861 (1944).

Ground of motion for new trial, not indicating that evidence was illegally withheld from jury against demand of applicant under this section, does not contain a sufficient assignment of error. *Ponder v. Walker*, 107 Ga. 753, 33 S.E. 690 (1899).

Ground of motion for new trial based upon admission of evidence should state objection made to evidence, and that such objection was urged at time evidence was offered; otherwise no question is raised for determination. *Adkins v. State*, 137 Ga. 81, 72 S.E. 897 (1911); *McDonald v. State*, 21 Ga. App. 125, 94 S.E. 262 (1917).

It is insufficient to show that ground of objection existed at time of making of motion. *Andrews v. State*, 118 Ga. 1, 43 S.E. 852 (1903); *Richardson v. State*, 141 Ga. 782, 82 S.E. 134 (1914).

Objection urged in motion for new trial must be same as objection made during trial. *Cooner v. State*, 16 Ga. App. 539, 85 S.E. 688 (1915).

Materiality of excluded evidence and object for which it was offered must appear in motion for new trial. *Weeks v. State*, 79 Ga. 36, 3 S.E. 323 (1887).

Plaintiff in error must show that he was harmed and prejudiced by ruling complained of. — In order for court to grant new trial because of alleged error in introduction of evidence, upon direct exception to this court, it is incumbent upon plaintiff in error to show affirmatively in bill of exceptions, (see § 5-6-50), that he was harmed and prejudiced by such ruling; and where there is no brief of evidence before this court, and it is not made to appear from bill of exceptions but that there was other evidence before jury upon same subject,

Content of Motion (Cont'd)

plaintiff in error fails to show error requiring grant of new trial in erroneous introduction of such evidence. *McRae v. Boykin*, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936).

Evidentiary basis for motion under section must be set out. — Where evidence is not literally or in substance set out in motion for new trial, nor is same attached as an exhibit, motion is insufficient. *Jackson v. State*, 93 Ga. 190, 18 S.E. 401 (1893); *Norred v. State*, 127 Ga. 347, 56 S.E. 464 (1907); *Garvin v. State*, 76 Ga. App. 684, 47 S.E.2d 192 (1948).

Complaint in ground of motion for new trial of ruling admitting or excluding as evidence a paper, which does not set forth the paper literally or in substance in the ground itself or as an exhibit thereto properly identified, is insufficient to present any question for decision by Supreme Court on bill of exceptions assigning error (see § 5-6-50) on judgment refusing a new trial. *Williamson v. Prather*, 188 Ga. 545, 4 S.E.2d 140 (1939).

Assignment of error upon admission of evidence will not be considered where evidence alleged to have been illegally admitted is not set forth literally, or its substance clearly stated, in motion for new trial and objection thereto. *Pearson v. Brown*, 105 Ga. 802, 31 S.E. 746 (1898); *Hicks v. Mather*, 107

Ga. 77, 32 S.E. 901 (1899); *Georgia N. Ry. v. Hutchins & Jenkins*, 119 Ga. 504, 46 S.E. 659 (1904); *Hicks v. Webb*, 127 Ga. 170, 56 S.E. 307 (1906); *Smith v. Savannah Elec. Co.*, 25 Ga. App. 59, 102 S.E. 548 (1924).

Motion must state name of witness whose testimony is complained of. — Ground of motion for new trial which complains of admission of specified testimony must state name of witness whose testimony is complained of. *Adams v. State*, 22 Ga. App. 252, 95 S.E. 877 (1918).

Motion must show court was advised what answer of witness, whose testimony was excluded, would be. — Ground of motion for new trial, which assigns error because court excluded certain testimony of a witness, will not be considered, where movant has failed to show that court was advised as to what answer of witness would be. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

Motion claiming testimony lacked proper foundation, which fails to disclose preliminary testimony. — Ground for motion for new trial which complains of admission of testimony as to contradictory statements made by witness without sufficient foundation being laid therefor, but which does not disclose what preliminary testimony, in way of laying foundation, was produced, is incomplete. *Miliken v. State*, 8 Ga. App. 478, 69 S.E. 915 (1910).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 340, 343.

C.J.S. — 23 C.J.S., Criminal Law, § 1436. 66 C.J.S., New Trial, § 40.

ALR. — Statement by prosecuting attorney in presence of jury implying that defendant had made incriminating statements to him not in evidence, as ground of reversal or new trial, 52 ALR 1022.

Instruction on evidence as to conspiracy where there is no charge of conspiracy in indictment or information, 66 ALR 1311.

Reception of incompetent evidence in criminal case tried to court without jury as ground of reversal, 116 ALR 558.

Statements, comments, or conduct of court or counsel regarding perjury, as

ground for new trial or reversal in civil action or criminal prosecution other than for perjury, 127 ALR 1385.

Statements by a witness after criminal trial tending to show that his testimony was perjured, as ground for new trial, 158 ALR 1062.

Reference by counsel for prosecution in opening statement to matters which he does not later attempt to prove as ground for new trial, reversal, or modification, 28 ALR2d 972.

Prejudicial effect of argument or remark that adversary was attempting to suppress facts, 29 ALR2d 996.

Prejudicial effect of admission, in personal injury action, of evidence as to finan-

cial or domestic circumstances of plaintiff, 59 ALR2d 371.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 ALR2d 926.

Admissibility in criminal case, of evidence obtained by search conducted by school official or teacher, 49 ALR3d 978.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 ALR4th 810.

5-5-23. Newly discovered evidence.

A new trial may be granted in any case where any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts, is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial. (Ga. L. 1853-54, p. 46, § 1; Code 1863, § 3640; Code 1868, § 3665; Code 1873, § 3716; Code 1882, § 3716; Civil Code 1895, §§ 5480, 5481; Penal Code 1895, § 1061; Civil Code 1910, §§ 6085, 6086; Penal Code 1910, § 1088; Code 1933, § 70-204.)

Cross references. — Extraordinary motions for new trial, § 5-5-41.

JUDICIAL DECISIONS

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EXERCISE OF ORDINARY DILIGENCE

NEWLY DISCOVERED EVIDENCE

1. IN GENERAL

2. CUMULATIVE AND IMPEACHING EVIDENCE

3. APPLICATION

HEARING OF MOTIONS UNDER SECTION

General Consideration

Section permits new trial as to evidence brought in within time specified by § 5-5-40. Jackson v. Williams, 149 Ga. 505, 101 S.E. 116 (1919).

Policy of law to end litigation must yield to supreme object of achieving full justice. — Despite often-stated policy of law to end litigation, for which reason courts ordinarily look with disfavor upon grants of new trial upon newly discovered evidence, this policy of law must and does yield to higher and supreme object of law which is to do full justice in all cases. Matthews v. Grace, 199 Ga. 400, 34 S.E.2d 454 (1945).

Requirements for grant of new trial based on newly discovered evidence are: (1) that evidence has come to knowledge of moving party since trial; (2) that it was not owing to want of due diligence that moving party did not acquire it sooner; (3) that it was so material that it would probably produce a different verdict; and (4) that it is not cumulative only. Turner v. State, 139 Ga. App. 503, 229 S.E.2d 23 (1976); Jefferson v. State, 157 Ga. App. 324, 277 S.E.2d 317 (1981); Blankenship v. State, 162 Ga. App. 538, 292 S.E.2d 123 (1982).

It is incumbent on party who asks for new trial on ground of newly discovered evidence to satisfy court: (1) that evidence has come

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to his knowledge since trial; (2) that it was not owing to want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that affidavit of witness himself should be procured or its absence accounted for; and (6) that new trial will not be granted if only effect of evidence will be to impeach credit of witness. *Benefield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976); *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980); *Allanson v. State*, 158 Ga. App. 77, 279 S.E.2d 316 (1981); *Alexander v. State*, 186 Ga. App. 787, 368 S.E.2d 550 (1988).

In motion for new trial made upon alleged newly discovered evidence, where it appears that latter is purely cumulative, and it does not appear that with additional evidence a verdict different from that already rendered would probably result, and where it further appears that defendant and his counsel could, by exercise of slightest diligence, have discovered such evidence before or at time of trial, this court will not hold that trial judge abused his discretion in overruling motion. *Stargel v. State*, 52 Ga. App. 74, 182 S.E. 406 (1935).

To obtain a new trial on the basis of newly discovered evidence, a movant must satisfy the court (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence accounted for; and (6) that the new evidence does not operate solely to impeach the credibility of a witness. All six requirements must be satisfied before a new trial will be granted. *Young v. State*, 194 Ga. App. 335, 390 S.E.2d 305 (1990); *Eliopoulos v. State*, 203 Ga. App. 262, 416 S.E.2d 745, cert. denied, 203 Ga. App. 906, 416 S.E.2d 745 (1992).

Post-trial declaration. — The law is settled that a post-trial declaration by a state's witness that his former testimony was false is not a ground for a new trial. *Brown v. State*, 209 Ga. App. 314, 433 S.E.2d 321 (1993).

Movant bears burden of showing meeting of standards for granting new trial under

section. *James v. State*, 115 Ga. App. 822, 156 S.E.2d 183 (1967).

Where all requirements are met, grant of new trial is mandatory. — While section states that new trial may be granted, in proper case, where all rules of law have been met, new trial must be granted. *Matthews v. Grace*, 199 Ga. 400, 34 S.E.2d 454 (1945).

Failure to show one requirement is sufficient to deny motion for new trial. *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980).

All six requirements must be complied with to secure a new trial. *Westbrook v. State*, 186 Ga. App. 493, 368 S.E.2d 131, cert. denied, 186 Ga. App. 919, 368 S.E.2d 131 (1988).

Effect of noncompliance with section's requirements. — When requirements of section are not complied with, it is not error to overrule ground of motion for new trial based upon evidence alleged to be newly discovered, which might produce a different result should new trial be granted. *Blackwell v. Houston County*, 168 Ga. 248, 147 S.E. 574 (1929).

Grants of new trials on ground of newly discovered evidence are not favored by courts. *McDuffie v. State*, 2 Ga. App. 401, 58 S.E. 544 (1907); *Staton v. State*, 174 Ga. 719, 163 S.E. 901 (1932); *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944); *Grant v. State*, 74 Ga. App. 493, 40 S.E.2d 406 (1946); *Gates v. State*, 84 Ga. App. 367, 66 S.E.2d 342 (1951); *Fields v. State*, 212 Ga. 652, 94 S.E.2d 694 (1956); *Lord v. State*, 156 Ga. App. 492, 274 S.E.2d 641 (1980).

Motions for new trials based upon newly discovered evidence are not favored. *Norman v. Goode*, 121 Ga. 449, 49 S.E. 268 (1904); *Harris v. State*, 149 Ga. 724, 102 S.E. 159 (1920); *Reed Oil Co. v. Harrison*, 26 Ga. App. 37, 105 S.E. 496 (1920); *Hart v. State*, 207 Ga. 599, 63 S.E.2d 390 (1951); *James v. State*, 115 Ga. App. 822, 156 S.E.2d 183 (1967).

Great caution should be exercised in granting new trial on ground of newly discovered evidence. *Gates v. State*, 84 Ga. App. 367, 66 S.E.2d 342 (1951).

Reasons that new trials under section are not favored. — Generally granting of new trials on newly discovered evidence is not favored, because it tends to discourage diligence and encourage lack of diligence by

litigants and their counsel on first trial, causes delay in administering of justice, and loss of time, labor, and expense of another trial. *Turner v. State*, 44 Ga. App. 348, 161 S.E. 626 (1931).

Motions for new trial under section are not intended to serve purpose of cross-examination. *Greer & Co. v. Raney*, 120 Ga. 290, 47 S.E. 939 (1904); *Bullington v. Chandler*, 110 Ga. App. 803, 140 S.E.2d 59 (1964).

Discretion of judge. — Motions for new trial under section are addressed to sound discretion of judge. *Aycock v. State*, 188 Ga. 550, 4 S.E.2d 221 (1939); *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944); *Matthews v. Grace*, 199 Ga. 400, 34 S.E.2d 454 (1945); *Grant v. State*, 74 Ga. App. 493, 40 S.E.2d 406 (1946); *Lord v. State*, 156 Ga. App. 492, 274 S.E.2d 641 (1980); *Jefferson v. State*, 157 Ga. App. 324, 277 S.E.2d 317 (1981).

Motion must be addressed to sound legal discretion of court, and court alone must be trier of weight and credibility of testimony. *Morgan v. State*, 16 Ga. App. 559, 85 S.E. 827 (1915).

Grant or denial of motion for new trial based on newly discovered evidence is largely discretionary with trial judge. *James v. State*, 115 Ga. App. 822, 156 S.E.2d 183 (1967).

Applications for new trial are in large part addressed to the sound discretion of the trial judge. *Allanson v. State*, 158 Ga. App. 77, 279 S.E.2d 316 (1981).

Motions for new trial on the ground of newly discovered evidence are addressed to the sole discretion of the trial judge, which will not be controlled unless abused. *Blankenship v. State*, 162 Ga. App. 538, 292 S.E.2d 123 (1982).

The grant or denial of a new trial based on newly discovered evidence is a decision within the sound discretion of the trial court. Its ruling will not be disturbed absent an abuse of that discretion. *Wilson v. State*, 193 Ga. App. 374, 387 S.E.2d 642 (1989).

New trial under section should not be granted unless it appears different verdict will result. — Unless it is reasonably apparent from record that alleged newly discovered evidence will likely produce a different verdict upon another trial, a motion for new trial based upon that ground should not be

granted. *Lord v. State*, 156 Ga. App. 492, 274 S.E.2d 641 (1980); *Blankenship v. State*, 162 Ga. App. 538, 292 S.E.2d 123 (1982).

Courts are not obliged to grant new trial for newly discovered evidence unless they are reasonably convinced that on another trial there will probably be different verdict. *Oglesby v. Cason*, 65 Ga. App. 813, 16 S.E.2d 493 (1941); *Baumbach v. Dickens*, 213 Ga. 745, 101 S.E.2d*702 (1958).

On hearing extraordinary motion for new trial under section, if it is not reasonably apparent to judicial mind that new facts would probably produce a different verdict, new trial should not be ordered. *Fields v. State*, 212 Ga. 652, 94 S.E.2d 694 (1956); *Stevens v. State*, 119 Ga. App. 102, 166 S.E.2d 413 (1969).

Unless newly discovered evidence is of such character as upon another trial would likely produce different result, judge does not err in overruling motion for new trial. *Cannon v. State*, 194 Ga. 277, 21 S.E.2d 689 (1942).

To warrant granting of new trial under section, it must be shown that different result may obtain at second trial. *Morris Storage & Transf. Co. v. Wilkes*, 1 Ga. App. 751, 58 S.E. 232 (1907); *Mayor of Athens v. Peeler*, 6 Ga. App. 379, 65 S.E. 45 (1909); *Wright v. Wright*, 25 Ga. App. 721, 104 S.E. 456 (1920); *Oglesbee v. State*, 25 Ga. App. 750, 105 S.E. 51 (1920); *Republic Truck Sales Corp. v. Padgett*, 30 Ga. App. 474, 118 S.E. 435 (1923); *Alexander v. Allen*, 101 Ga. App. 706, 115 S.E.2d 258 (1960).

If it is not reasonably apparent to judicial mind that new facts would probably produce different verdict, new trial should not be ordered. *Hamilton v. State*, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Where newly discovered evidence offered in support of motion for new trial was of such character as probably would, if credited by jury, produce a different result upon another investigation, trial judge erred in overruling motion. *McDaniel v. State*, 74 Ga. App. 5, 38 S.E.2d 697 (1946).

Where it has not been shown that the newly discovered evidence was so material that it would probably produce a different verdict, or that it could not have been discovered during trial by the exercise of reasonable diligence there is no abuse of discretion by the trial court in overruling

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defendant's motion for a new trial. *Covington v. State*, 157 Ga. App. 371, 277 S.E.2d 744 (1981).

Standard of review. — Trial judge's ruling on motion under section will not be disturbed absent manifest abuse of discretion. *Aycock v. State*, 188 Ga. 550, 4 S.E.2d 221 (1939); *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944); *Matthews v. Grace*, 199 Ga. 400, 34 S.E.2d 454 (1945); *Grant v. State*, 74 Ga. App. 493, 40 S.E.2d 406 (1946); *James v. State*, 115 Ga. App. 822, 156 S.E.2d 183 (1967); *Lord v. State*, 156 Ga. App. 492, 274 S.E.2d 641 (1980).

Order of trial judge in refusing to grant new trial on ground of newly discovered evidence will not be disturbed unless it is shown that he has abused his discretion. *Baumbach v. Dickens*, 213 Ga. 745, 101 S.E.2d 702 (1958).

Trial judge's grant of new trial under section will not be disturbed unless it is made to appear that he abused his discretion. *Exchange Bank v. Cone*, 18 Ga. App. 432, 89 S.E. 489 (1916).

Refusal to grant the motion will not be reversed unless the trial judge's discretion is abused. *Jefferson v. State*, 157 Ga. App. 324, 277 S.E.2d 317 (1981).

Refusal of new trial not disturbed unless it appears new evidence would change result.

— Discretion of trial judge in refusing to grant new trial on ground of newly discovered evidence will not be controlled, unless it plainly appears that evidence alleged to have been newly discovered would probably change result. This rule is peculiarly applicable where alleged newly discovered testimony in criminal case relates to facts which are not vitally material to issue of defendant's guilt or innocence. *Taylor v. State*, 13 Ga. App. 689, 79 S.E. 862 (1913).

Cited in *Atlanta Rapid Transit Co. v. Young*, 117 Ga. 349, 43 S.E. 861 (1903); *Trammell v. Shirley*, 38 Ga. App. 710, 145 S.E. 486 (1928); *Smith v. State*, 170 Ga. 234, 152 S.E. 482 (1930); *Booth v. Rickerson*, 45 Ga. App. 733, 165 S.E. 893 (1932); *Capps v. Toccoa Falls Light & Power Co.*, 46 Ga. App. 268, 167 S.E. 530 (1933); *McDow v. State*, 176 Ga. 764, 168 S.E. 869 (1933); *Thompson v. Growers' Fin. Corp.*, 49 Ga. App. 119, 174 S.E. 192 (1934); *Gibson v. State*, 178 Ga. 707,

174 S.E. 354 (1934); *Terry v. State*, 49 Ga. App. 343, 175 S.E. 403 (1934); *Goodson v. State*, 50 Ga. App. 91, 176 S.E. 916 (1934); *Booker v. State*, 50 Ga. App. 66, 176 S.E. 917 (1934); *Jackson Disct. Co. v. Merck*, 50 Ga. App. 381, 178 S.E. 208 (1935); *Le Counte v. State*, 51 Ga. App. 421, 180 S.E. 657 (1935); *Wright v. State*, 184 Ga. 62, 190 S.E. 663 (1937); *Whately v. Henry*, 65 Ga. App. 668, 16 S.E.2d 214 (1941); *Mills v. State*, 193 Ga. 139, 17 S.E.2d 719 (1941); *Parsons v. Georgia Power Co.*, 67 Ga. App. 517, 21 S.E.2d 257 (1942); *Jones v. State*, 68 Ga. App. 210, 22 S.E.2d 671 (1942); *Landers v. State*, 68 Ga. App. 804, 24 S.E.2d 139 (1943); *Johnson v. State*, 196 Ga. 806, 27 S.E.2d 749 (1943); *Buttersworth v. State*, 200 Ga. 13, 36 S.E.2d 301 (1945); *Brown v. State*, 73 Ga. App. 420, 37 S.E.2d 163 (1946); *Luce v. Evans*, 202 Ga. 48, 41 S.E.2d 878 (1947); *Mooney v. Shelfer*, 205 Ga. 766, 55 S.E.2d 212 (1949); *McCowen v. Aldred*, 85 Ga. App. 373, 69 S.E.2d 660 (1952); *Randall v. Whitman*, 88 Ga. App. 803, 78 S.E.2d 78 (1953); *Gibson v. State*, 210 Ga. 440, 80 S.E.2d 681 (1954); *Fields v. Balkcom*, 211 Ga. 797, 89 S.E.2d 189 (1955); *Lightfoot v. Applewhite*, 212 Ga. 136, 91 S.E.2d 37 (1956); *Fortner v. State*, 96 Ga. App. 855, 101 S.E.2d 908 (1958); *Austin v. State*, 121 Ga. App. 244, 173 S.E.2d 452 (1970); *Bickford v. Bickford*, 228 Ga. 353, 185 S.E.2d 756 (1971); *Vinson v. State*, 127 Ga. App. 607, 194 S.E.2d 583 (1972); *Blair v. State*, 230 Ga. 409, 197 S.E.2d 362 (1973); *Shepherd v. Shepherd*, 233 Ga. 228, 210 S.E.2d 731 (1974); *Downs v. State*, 141 Ga. App. 173, 233 S.E.2d 32 (1977); *Maddox v. Thomas*, 151 Ga. App. 477, 260 S.E.2d 355 (1979); *Cartin v. Boles*, 155 Ga. App. 248, 270 S.E.2d 799 (1980); *Curry v. State*, 155 Ga. App. 829, 273 S.E.2d 411 (1980); *Austin v. McNeese*, 156 Ga. App. 533, 275 S.E.2d 79 (1980); *Transport Ins. Co. v. Ferguson*, 156 Ga. App. 715, 275 S.E.2d 354 (1980); *Fields v. Fields*, 247 Ga. 437, 276 S.E.2d 614 (1981); *Cody v. State*, 160 Ga. App. 86, 286 S.E.2d 321 (1981); *Powell v. State*, 160 Ga. App. 210, 286 S.E.2d 513 (1981); *Drake v. State*, 248 Ga. 891, 287 S.E.2d 180 (1982); *Willis v. State*, 249 Ga. 261, 290 S.E.2d 87 (1982); *Payne v. State*, 161 Ga. App. 233, 291 S.E.2d 236 (1982); *Collier v. State*, 169 Ga. App. 69, 311 S.E.2d 242 (1983); *Llewellyn v. State*, 252 Ga. 426, 314 S.E.2d 227 (1984); *Ansell v. State*, 172 Ga. App. 89, 321 S.E.2d 819

(1984); *Mason v. State*, 177 Ga. App. 184, 338 S.E.2d 706 (1985); *Joe N. Guy Co. v. Valiant Steel & Equip., Inc.*, 196 Ga. App. 20, 395 S.E.2d 310 (1990); *McIntyre v. State*, 207 Ga. App. 129, 427 S.E.2d 99 (1993); *Betha v. State*, 208 Ga. App. 802, 432 S.E.2d 242 (1993).

Extraordinary Motions Under Section

Extraordinary motions or cases contemplated by section are such as do not ordinarily occur in transaction of human affairs, as when a man has been convicted of murder, and it afterwards appears that supposed deceased is still alive, or where one is convicted on testimony of witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like character. *Manchester v. State*, 175 Ga. 906, 166 S.E. 651 (1932).

Stricter rule is applied to extraordinary motions under section than to ordinary motions. *Kryder v. State*, 76 Ga. App. 546, 46 S.E.2d 526 (1948).

Extraordinary motions for new trials, based solely upon ground of newly discovered evidence, are viewed by courts with even less favor than original motions based on such ground, a stricter rule being applied to the former. *Norman v. Goode*, 121 Ga. 449, 49 S.E. 268 (1904); *Jackson v. State*, 50 Ga. App. 243, 177 S.E. 819 (1934).

Extraordinary motions for new trial based on newly discovered evidence are not favored by law. *Fields v. State*, 212 Ga. 652, 94 S.E.2d 694 (1956); *Stevens v. State*, 119 Ga. App. 102, 166 S.E.2d 413 (1969); *Hamilton v. State*, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Extraordinary motion for new trial under section is addressed to sound discretion of trial judge. *Fields v. State*, 212 Ga. 652, 94 S.E.2d 694 (1956); *Stevens v. State*, 119 Ga. App. 102, 166 S.E.2d 413 (1969); *Hamilton v. State*, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Refusal to grant extraordinary motion under section will not be reversed absent abuse of discretion. *Fields v. State*, 212 Ga. 652, 94 S.E.2d 694 (1956); *Stevens v. State*, 119 Ga. App. 102, 166 S.E.2d 413 (1969); *Hamilton v. State*, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Cannot be based on evidence known or discoverable in permissible time. — Extraordinary motion for new trial cannot be based upon evidence which was known to the movant or which could have been discovered in time by proper diligence. *Hamilton v. State*, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Must contain certified copy of evidence adduced upon trial. — Where accused has been convicted, a new trial denied him, and that judgment affirmed, in order for extraordinary motion for new trial on ground of newly discovered evidence to be a valid motion, it must appear that newly discovered evidence is not merely cumulative or impeaching, and that newly discovered evidence would likely produce a different result. As none of these requirements can be determined without an examination of evidence adduced upon original trial of case, an extraordinary motion for new trial that does not contain a certified copy of evidence adduced upon original trial is not a good motion and can be denied upon this ground alone. *Fields v. State*, 212 Ga. 652, 94 S.E.2d 694 (1956).

Court may allow oral or parol testimony. — On hearing of extraordinary motion for new trial, it is not error for court to allow, over objection, oral or parol testimony. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Judge may hear affidavits, though witnesses are present unless objection is made. — In hearing on extraordinary motion for new trial, where witnesses are present, and do not object, presiding judge has discretion as to whether he will hear affidavits or oral testimony. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

On hearing of extraordinary motion for new trial, pertinent parts of trial record are admissible. — It is not error on hearing of extraordinary motion for new trial to admit, over objection, record of evidence taken at main trial bearing upon question to be decided. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Filing of extraordinary motion not affected by notice of appeal. — While it is elementary that after notice of appeal has been filed to judgment of trial court, judge no longer has jurisdiction to reconsider and change it, this has no bearing on extraordi-

Extraordinary Motions Under Section (Cont'd)

nary motions filed under this section. *Brooks v. Williams*, 127 Ga. App. 311, 193 S.E.2d 231 (1972).

Exercise of Ordinary Diligence

Where record shows that no diligence was exercised, motion under section is not meritorious. *Williams v. State*, 199 Ga. 504, 34 S.E.2d 854 (1945).

Where a defendant was knowledgeable as to the identity of an eyewitness, yet did not exercise due diligence to locate him, no subpoena was issued for this witness to appear at the trial, and there was no attempt made to obtain a continuance of the case so that this witness could be located, the trial court did not err in denying the motion for new trial. *Curtiss v. State*, 165 Ga. App. 464, 302 S.E.2d 1 (1983).

Where movant knew or should have known of evidence, motion is without merit. — The ground of the motion for new trial based on alleged newly discovered evidence is without merit, where it appears from the ground that such evidence must have been, or should have been known to the defendant before trial. *Bissell v. State*, 157 Ga. App. 711, 278 S.E.2d 415 (1981).

No new trial as to evidence that could have been secured earlier through ordinary diligence. — New trials based on newly discovered evidence should not be granted unless it appears that testimony alleged to be newly discovered could not have been secured at trial by exercise of ordinary diligence. *Copelan v. State*, 7 Ga. App. 690, 67 S.E. 833 (1910).

Motion for new trial on this ground should not be granted unless it appears that applicant's ignorance of alleged newly discovered evidence at time of trial was not the result of negligence. *Williams v. State*, 67 Ga. 260 (1881).

Where evidence could have been discovered before trial by exercise of diligence, trial judge does not abuse his discretion in refusing new trial. *Cadwalader v. Fendig*, 137 Ga. 140, 72 S.E. 903 (1911); *Rothschild & Co. v. Arenson & Co.*, 22 Ga. App. 337, 96 S.E. 14 (1918); *Sovereign Camp of Woodmen of the World v. Winn*, 23 Ga. App. 760, 99 S.E. 319 (1919).

Judge is trier of whether or not sufficient diligence has been shown. *Matthews v. Grace*, 199 Ga. 400, 34 S.E.2d 454 (1945).

Determination of whether diligence exercised was ordinary. — Whether diligence used was ordinary or less than ordinary must be determined in each case by comparing conduct under consideration with that of ordinary man under similar circumstances. *Orr v. State*, 5 Ga. App. 76, 62 S.E. 676 (1908).

It is not incumbent upon state to show lack of diligence. *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980).

Mere statement that evidence could not have been discovered through ordinary diligence is insufficient. — Mere general statements by defendant and counsel that they did not know of evidence and could not have discovered it by exercise of ordinary diligence are insufficient to sustain motion for new trial on ground of newly discovered evidence. *James v. State*, 115 Ga. App. 822, 156 S.E.2d 183 (1967).

Mere assertion that evidence could not have been discovered by ordinary diligence is insufficient. *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980).

The mere allegation that the evidence could not have been discovered by ordinary diligence is insufficient to show that the evidence could not have been discovered prior to trial. *Jefferson v. State*, 157 Ga. App. 324, 277 S.E.2d 317 (1981).

Diligence before trial will not be inferred from diligence after conviction. *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980).

Ordinary diligence requires pretrial inspection of place where accident occurred. *Cadwalader v. Fendig*, 137 Ga. 140, 72 S.E. 903 (1911); *Realty Bond & Mtg. Co. v. Harley*, 19 Ga. App. 186, 91 S.E. 254 (1917).

Newly Discovered Evidence

1. In General

Newly discovered evidence must be admissible as evidence to provide basis for new trial. *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980).

Where ground of motion for new trial, based on newly discovered evidence, is predicated on certified copies of various documents, and contains much that would not be admissible in event of another trial, it is

proper for trial judge and for reviewing court, in passing upon ground, to consider only such portions of alleged newly discovered evidence as would be admissible in event of new trial. *Williams v. State*, 199 Ga. 504, 34 S.E.2d 854 (1945).

To entitle one convicted of crime to new trial on ground of newly discovered evidence, such evidence must be admissible and must not be merely cumulative. *Hornbuckle v. State*, 76 Ga. App. 111, 45 S.E.2d 98 (1947).

Evidence itself, rather than witnesses, must be newly discovered. — Alleged newly discovered evidence is no cause for new trial, unless it shall appear that evidence itself is newly discovered, not merely that certain named witnesses by whom facts can be proved were unknown until after trial. *Watkins v. State*, 18 Ga. App. 60, 88 S.E. 1000 (1916); *Bass v. State*, 154 Ga. 112, 113 S.E. 524 (1922); *Manchester v. State*, 175 Ga. 906, 166 S.E. 651 (1932).

Newly discovered evidence must be material to issue involved in trial. *Oppenheim v. State*, 12 Ga. App. 480, 77 S.E. 652 (1913).

Evidence should relate to new material facts, likely to produce different result on second trial. — It is essential that evidence should be material, relating to new and material facts, and such as will be likely to produce different result on second trial. *Goldberg v. State*, 16 Ga. App. 691, 85 S.E. 972 (1915).

Must relate to new material facts discovered after verdict. — Newly discovered evidence must also be material in relating to new and material facts discovered by applicant after rendition of verdict against him. *Alexander v. Allen*, 101 Ga. App. 706, 115 S.E.2d 258 (1960).

Evidence which must have been known before trial ended. — Evidence which, in the nature of things, must have been known to accused before trial ended cannot after verdict be treated as newly discovered. *Oglesby v. Cason*, 65 Ga. App. 813, 16 S.E.2d 493 (1941).

Motion for new trial on this ground should not be granted unless it appears that evidence was discovered by applicant after verdict against him. *Collins v. State*, 21 Ga. App. 128, 94 S.E. 77 (1917).

Evidence which could have been discovered and presented at trial. — If evidence

subsequently relied upon is such that it could have been discovered with ordinary diligence and presented at trial, motion for new trial should be denied. *Dyal v. State*, 121 Ga. App. 50, 172 S.E.2d 326 (1970).

Affidavit submitted by litigant's counsel purporting to show newly discovered evidence is insufficient to serve as grounds for new trial. Among other requirements, the affidavit of the witness himself should be procured or its absence accounted for. *Head v. State*, 160 Ga. App. 4, 285 S.E.2d 735 (1981).

Where appellant did not obtain the witness's affidavit as to newly discovered evidence, nor account for its absence, there was no concrete indication as to what the newly discovered evidence would be, if a new trial were had. Thus, the trial court did not err in overruling the motion for new trial. *Kuchenmeister v. State*, 199 Ga. App. 64, 403 S.E.2d 847, cert. denied, 199 Ga. App. 906, 403 S.E.2d 847 (1991).

2. Cumulative and Impeaching Evidence

Newly discovered evidence will not authorize new trial when merely cumulative or impeaching in character. *Aycock v. State*, 188 Ga. 550 4 S.E.2d 221 (1939); *Hart v. State*, 207 Ga. 599, 63 S.E.2d 390 (1951); *Fields v. State*, 212 Ga. 652, 94 S.E.2d 694 (1956).

Even where all the requirements of this section are met, a new trial is not demanded where the newly discovered evidence is no more than impeaching in character. *Cole v. Shoffner*, 205 Ga. App. 65, 421 S.E.2d 322 (1992).

Newly discovered evidence which is merely impeaching and cumulative in character is not ground for a new trial. *Brantley v. State*, 16 Ga. App. 6, 84 S.E. 131 (1915); *Hamilton v. State*, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Newly discovered evidence that is merely impeaching in nature will not authorize a new trial, even though such evidence may relate to only testimony on some vital point. *Johnson v. State*, 196 Ga. 806, 27 S.E.2d 749 (1943).

Newly discovered evidence which is impeaching only is not basis for granting of new trial. *Drane v. State*, 130 Ga. 349, 60 S.E. 863 (1908); *Bass v. State*, 154 Ga. 112, 113 S.E. 524 (1922); *Jones v. Knightstown Body Co.*, 52 Ga. App. 667, 184 S.E. 427 (1936);

Newly Discovered Evidence (Cont'd)
2. Cumulative and Impeaching Evidence (Cont'd)

Williams v. State, 199 Ga. 504, 34 S.E.2d 854 (1945); *Stembridge v. Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952); *Williams v. State*, 98 Ga. App. 346, 105 S.E.2d 771 (1958).

Newly discovered evidence which merely impeaches testimony of witnesses for state, and which would not likely produce different result on another trial if admitted, is not sufficient to authorize grant of new trial. *Spell v. State*, 225 Ga. 705, 171 S.E.2d 285 (1969).

Newly discovered evidence merely cumulative in nature is not a sufficient ground for grant of new trial. *Walker v. State*, 126 Ga. 588, 55 S.E. 483 (1906); *Lawhorn v. State*, 155 Ga. 373, 116 S.E. 822 (1923); *Baumbach v. Dickens*, 213 Ga. 745, 101 S.E.2d 702 (1958); *Benefield v. State*, 140 Ga. App. 727, 232 S.E.2d 89 (1976).

Where newly discovered evidence is strictly cumulative and merely increases weight of evidence, leaving still in doubt a material question at issue, new trial will not be granted. *Bragg v. State*, 15 Ga. App. 368, 83 S.E. 274 (1914).

A new trial will not be granted if the only effect of the newly discovered evidence will be to impeach the credit of a witness. *Hutto v. State*, 158 Ga. App. 3, 279 S.E.2d 278 (1981).

In a motion for a new trial based on newly discovered evidence, where a newly discovered witness only offered impeaching testimony, it did not constitute newly discovered evidence. *Allain v. State*, 202 Ga. App. 706, 415 S.E.2d 315 (1992).

Ultimate criterion is probability of different result. — Although newly discovered evidence may be somewhat cumulative of testimony previously introduced, and impeaching in its character, ultimate criterion is probability of different result. *Paden v. State*, 17 Ga. App. 112, 86 S.E. 287 (1915); *McDaniel v. State*, 74 Ga. App. 5, 38 S.E.2d 697 (1946).

When cumulative or impeaching evidence might justify new trial. — Cumulative evidence might justify a new trial, if it has effect of rendering clear and positive that which was before equivocal and uncertain.

Dougherty v. State, 7 Ga. App. 91, 66 S.E. 276 (1909).

Evidence of new, independent fact, indicating accused's innocence, suffices. — Evidence of new and independent fact, indicating innocence of accused, even though impeaching and cumulative in a sense, if other requirements have been fulfilled, requires new trial. *Mosley v. State*, 17 Ga. App. 740, 88 S.E. 415 (1916).

What is cumulative evidence. — Cumulative evidence is evidence tending to establish a fact in relation to which there was evidence upon trial. *Walker v. State*, 126 Ga. 588, 55 S.E. 483 (1906); *Lawhorn v. State*, 155 Ga. 373, 116 S.E. 822 (1923); *Baumbach v. Dickens*, 213 Ga. 745, 101 S.E.2d 702 (1958).

Evidence is cumulative when it goes to fact principally controverted upon trial, and respecting which party asking for new trial produced testimony. *Greenway v. Sloan*, 211 Ga. 775, 88 S.E.2d 366 (1955); *Fields v. State*, 212 Ga. 652, 94 S.E.2d 694 (1956); *Baumbach v. Dickens*, 213 Ga. 745, 101 S.E.2d 702 (1958).

Evidence which covers same point is cumulative. *McKinnon v. Henderson*, 145 Ga. 373, 89 S.E. 415 (1916).

To be noncumulative, evidence must concern new issue or be of higher grade. — It is only when newly discovered evidence either relates to particular material issue concerning which no witness has previously testified, or is of a higher and different grade from that previously had on same material point, that it will ordinarily be taken outside definition of cumulative evidence, and afford basis for new trial. *Johnson v. State*, 196 Ga. 806, 27 S.E.2d 749 (1943).

That newly discovered evidence incidentally strengthens defense used in trial does not make it cumulative, where it is comprised of new, distinct and material facts about which no witness testified at trial, thereby supplying link or gap missing in previous testimony. *Bell v. State*, 227 Ga. 800, 183 S.E.2d 357 (1971).

Evidence not rendered noncumulative merely because furnished by stranger to litigation. — Evidence is not rendered noncumulative, so as to afford basis for demanding new trial on ground of newly discovered evidence, merely because it is to be furnished by stranger to litigation upon matter otherwise covered only by testimony of par-

ties. *Baumbach v. Dickens*, 213 Ga. 745, 101 S.E.2d 702 (1958).

New evidence which is immaterial, incompetent, or merely impeaching is not ground for new trial. *Ponder v. Walker*, 107 Ga. 753, 33 S.E. 690 (1899); *Fort v. State*, 3 Ga. App. 448, 60 S.E. 282 (1908); *Graham v. Owens*, 18 Ga. App. 284, 89 S.E. 304 (1916); *Jenkins v. Jenkins*, 150 Ga. 77, 102 S.E. 425 (1920); *Hill v. Overstreet*, 28 Ga. App. 786, 113 S.E. 41 (1922); *Fairburn & A. Ry. & Elec. Co. v. Hale*, 32 Ga. App. 412, 123 S.E. 724 (1924).

Newly discovered evidence which is no more than impeaching in character, falls under inhibition of section, although in every other respect it meets requirements of this section dealing with circumstances under which new trial may be granted on ground of newly discovered evidence. *Stembridge v. State*, 84 Ga. App. 413, 65 S.E.2d 819 (1951), cert. dismissed, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952).

Extrajudicial admissions of party are not merely impeaching, and where such admissions show a new and distinct right to recover, or a different theory of recovery, from that relied upon at trial, or where similar extrajudicial admissions of same party were not proved upon trial of case, such evidence may be ground for new trial. *Wiggins v. Lord*, 87 Ga. App. 486, 74 S.E.2d 389 (1953).

3. Application

Post-trial admissions or declarations of successful party as ground for new trial. — New trial may be granted for newly discovered evidence of material admissions of successful party, which is not cumulative to other evidence offered at trial. Evidence of admissions made by successful party after trial, or subsequent declarations inconsistent with his testimony on trial, may be ground for setting aside verdict, at least in interest of justice. *Perry v. Hammock*, 75 Ga. App. 171, 42 S.E.2d 651 (1947).

Evidence that conviction was procured by perjured testimony, with prosecutor's knowledge. — Where it is shown and not denied that conviction was procured by perjured testimony, which testimony state's prosecuting attorney knew to be perjured at time it was introduced, due process as guaranteed by fourteenth amendment is denied, and such testimony is not merely impeaching in character but has probative force. *Burke v.*

State, 205 Ga. 656, 54 S.E.2d 350 (1949).

Section does not preclude evidence showing witness's error in former certificate as to transcript of record. — Section does not prevent introduction of evidence which goes to show that error was made by witness in his former certificate as to transcript of record. Such evidence does not impeach former testimony or transcript, although it may be contradictory. It is explanatory, as showing way and manner in which such alleged error may have occurred. *Sheffield v. Hawkins*, 47 Ga. App. 162, 170 S.E. 100 (1933).

Discovered attempt of prosecutor to bribe individual to swear falsely. — It is no cause for new trial that accused has discovered that certain person will swear that prosecutor sought to bribe him to swear falsely. *Duggan v. State*, 124 Ga. 438, 52 S.E. 748 (1905).

Effect of showing that efforts were made to get certain persons to testify falsely against defendant, which persons did not testify at all, could only be material as a circumstance to show that same effort was made to get those who did testify against defendant to likewise swear falsely. It therefore follows that such newly discovered evidence is merely impeaching in its character and is therefore not a good ground for new trial. *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948).

Newly discovered evidence tending to impeach state's witness. *Jenkins v. State*, 19 Ga. App. 626, 91 S.E. 944 (1917).

Extrajudicial declarations by witness not ground for new trial. — That witness, after trial, made certain declarations at variance with his sworn testimony, will not work new trial. *Lasseter v. Simpson*, 78 Ga. 61, 3 S.E. 243 (1886); *Smarr v. Kerlin*, 21 Ga. App. 813, 95 S.E. 306 (1918); *Adams v. Ginn*, 27 Ga. App. 222, 107 S.E. 608 (1921).

Declarations of witness at variance with testimony. — Declarations of witness at variance with what she testified to upon trial do not constitute reasons for grant of new trial under section. *Gates v. State*, 84 Ga. App. 367, 66 S.E.2d 342 (1951).

Individual's statement to another that he, rather than accused, perpetrated offense. — Declarations to third persons against declarant's penal interest, to effect that declarant, and not accused, was actual perpetrator of offense, are not admissible in favor of accused at his trial, or to procure

Newly Discovered Evidence (Cont'd)**3. Application (Cont'd)**

new trial on basis of newly discovered evidence. *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980).

No new trial where movant's counsel knew of existence of certain papers before trial. *Hearn v. Roberts*, 27 Ga. App. 411, 108 S.E. 622, cert. denied, 27 Ga. App. 835 (1921).

Recent photo of another suspect not ground for new trial where other recent photo was available. — Defendant's motion for new trial on basis of newly discovered, recent photo of another suspect and of district attorney's failure to bring such photo to attention of defendant or trial court was properly denied where defendant had access to different photo, which was less than two years old, and used it to examine his witness but did not seek to examine state's eyewitnesses by use of photo; and where defendant failed to tender post trial evidence that any of state's eyewitnesses would identify other suspect from newly discovered photo, leading trial court to conclude that photo was not so material that it would probably produce a different verdict. *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980).

Evidence offered to establish alibi, contradicted at trial. — Where evidence presented at hearing on motion to reopen case involving operation of automobile during period driver's license was suspended attempted only to establish alibi and there was positive evidence to contrary presented at original hearing, it was not newly discovered evidence as contemplated under this section. *Whitley v. State*, 79 Ga. App. 600, 54 S.E.2d 486 (1949).

Evidence which would do no more than make case of oath against oath. — Where alleged newly discovered evidence would do no more than make case of oath against oath i.e., new witness swearing prosecutrix was lying and vice versa, on issues already covered at trial, presumption in favor of verdict is sufficient to turn scale or at least to sustain exercise of discretion by presiding judge upholding verdict. *Jackson v. State*, 56 Ga. App. 250, 192 S.E. 454 (1937).

Existing rulings of Interstate Commerce Commission court cannot be set up as newly discovered evidence. *Macon D. & S.R.R. v. Robinson*, 19 Ga. App. 370, 91 S.E. 492 (1917).

No new trial as to facts known to summoned witness who did not testify. — Where witnesses summoned by defendant are present at trial but are not examined, new trial will not be granted on ground that since verdict defendant has for first time learned that they could have testified to facts material to his defense. *Hall v. State*, 117 Ga. 263, 43 S.E. 718 (1903); *Rounsaville v. State*, 163 Ga. 391, 136 S.E. 276 (1926).

Fact that trial witness would have testified differently had he not been ill is insufficient. — It is no ground for new trial that witness who testified upon trial would have testified to other facts in contradiction of other testimony, had he not, at time of rendition of his testimony, been ill and under influence of drugs. *Duren v. Clark*, 47 Ga. App. 429, 170 S.E. 693 (1933).

Forgetfulness by party of material fact on trial. *Oglesby v. Cason*, 65 Ga. App. 813, 16 S.E.2d 493 (1941).

New and material evidence found. — Discovery of the fact that the former wife had remarried the day before a trial on issues of alimony, child support, and property disposition is new and material evidence warranting a new trial. *Hegedus v. Hegedus*, 255 Ga. 44, 335 S.E.2d 284 (1985).

Denial of a motion for new trial not abuse of discretion. See *Pendergrass v. State*, 168 Ga. App. 190, 308 S.E.2d 585 (1983).

Where plaintiff in a malpractice action moved for a new trial claiming the discovery of new evidence in that a 1981 x-ray defendant introduced at trial as depicting her shoulder was, in fact, an x-ray of someone else's shoulder because a prosthesis was not depicted therein, but the record reveals that plaintiff did not exercise due diligence in determining that fact before the end of trial, having fallen short of meeting the requirements for the grant of a new trial, plaintiff had no basis for asserting that the trial court had abused its discretion by denying her motion. *Boatwright v. Eddings*, 180 Ga. App. 742, 350 S.E.2d 291 (1986).

In a prosecution for serial rape, the trial court did not abuse its discretion by denying a motion for a new trial where defendant failed to establish the existence or the relevance of new evidence of the nonoccurrence of a prior incident not originally in the record. *Jefferson v. State*, 206 Ga. App. 544, 425 S.E.2d 915 (1992).

Hearing of Motions Under Section

Each case of newly discovered evidence must be judged on its own facts. *Tanner v. State*, 247 Ga. 438, 276 S.E.2d 627 (1981).

In motion for new trial under section trial judge becomes trier of that issue. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Judge shall determine credibility of conflicting facts and contradictory witnesses. — Upon hearing of motion for new trial, based upon newly discovered evidence, where affidavits are introduced supporting and disputing ground of motion, trial judge is trier of facts, and it is his province to determine credibility of conflicting facts and contradictory witnesses. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Court must consider alleged newly discovered evidence in comparison with evidence adduced at trial. — Under motion for new trial based upon newly discovered evidence, trial court and appellate court are necessarily required to consider alleged newly discovered evidence in light of and in comparison with evidence adduced at trial, and on which conviction is based, in order that court may determine whether alleged newly discovered evidence is merely cumulative or impeaching. Accordingly, injury is done to defendant in appeal to allow introduction of evidence adduced at trial. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Fact that evidence authorized verdict does not preclude different result on new trial. — Fact that verdict was authorized by evidence adduced at trial in no way precludes probability of different verdict on another trial with newly discovered evidence, where evidence merely authorized, but did not demand, verdict, and such verdict was before vital, newly discovered evidence supplying missing link was before jury. *Bell v. State*, 227 Ga. 800, 183 S.E.2d 357 (1971).

Appellate court will not control trial judge's discretion regarding credibility of witnesses. — Appellate court will not in appeal of motion for new trial control discretion of trial judge as to comparative credibility of witnesses who testified in support of motion and those who swore to contrary. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Presumption in favor of verdict sustains judge's discretion in upholding verdict where evidence conflicts. — Under motion

for new trial based upon newly discovered evidence, where evidence consists of conflicting oaths, presumption in favor of verdict is sufficient to sustain exercise of discretion by judge in upholding verdict. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

When countershowing is made on application under section, trial judge becomes trier of issue thus formed and his discretion is final and cannot be controlled by appellate court unless there is a manifest abuse of it. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

In motion for new trial based upon newly discovered evidence in criminal trial, where there is a countershowing by state, judge is trier of facts, and it is his province to determine credibility of facts and contradictory witnesses, and his discretion in refusing a new trial on alleged newly discovered evidence will not be controlled unless manifestly abused. *Bailey v. State*, 47 Ga. App. 856, 171 S.E. 874 (1933).

Where motion for new trial is based on ground of newly discovered evidence, and there is a countershowing, with conflicting evidence as to truth of alleged newly discovered facts, Supreme Court will not interfere with grant or refusal of new trial on that ground, unless there has been a manifest abuse of discretion which law has vested in trial judge, but not conferred on Supreme Court. *Southwell v. State*, 188 Ga. 310, 4 S.E.2d 26 (1939).

Trial judge does not abuse his discretion in refusing new trial where alleged newly discovered evidence is contradicted in countershowing. *Atlanta Consol. S. Ry. v. McIntire*, 103 Ga. 568, 29 S.E. 766 (1898); *Crumley v. State*, 23 Ga. App. 312, 98 S.E. 230 (1919); *Edenfield v. Brinson*, 149 Ga. 377, 100 S.E. 373 (1919); *Fackler v. Lifsey*, 28 Ga. App. 544, 112 S.E. 167 (1922).

Where conflict arises as to material facts upon which motion for new trial based on newly discovered evidence was based and as to credibility of witnesses, reviewing court will not hold that court erred in overruling motion. *Harper v. State*, 60 Ga. App. 684, 4 S.E.2d 734 (1939).

Where countershowing rendered it doubtful as to what witness would testify. — In motion for new trial upon ground of newly discovered evidence, where state made countershowing with later affidavit of witness

Hearing of Motions Under Section (Cont'd)

who proposed to testify in behalf of defendant, which showed that proposed witness largely repudiated his first affidavit, rendering it doubtful or equivocal as to what he would testify, judge did not err in overruling motion. *Cannon v. State*, 194 Ga. 277, 21 S.E.2d 689 (1942).

No error in denying defendant's motion for new trial. — Trial court did not err in denying defendant's motion for new trial where the state did not stipulate during the sentencing phase of trial that the shotgun found in defendant's possession was improv-

erly measured. The state simply did not object to defendant's introduction into evidence of a document giving instructions for measuring the length of the barrel of a rifle or shotgun. *Wiley v. State*, 204 Ga. App. 881, 420 S.E.2d 783, cert. denied, 204 Ga. App. 922, 420 S.E.2d 783 (1992).

Time for amendments. — The phrase "within the time allowed by law for entertaining a motion for new trial," indicates that amendments should be allowed until the trial court's final disposition of a motion for a new trial timely filed and should not be limited by the 30-day period specified in § 5-5-40(a). *Hegedus v. Hegedus*, 255 Ga. 44, 335 S.E.2d 284 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 414-450.

C.J.S. — 66 C.J.S., New Trial, §§ 101-114.

ALR. — *Coram nobis* on ground of newly discovered evidence, 33 ALR 84.

Statements by witness after criminal trial tending to show that his testimony was perjured, as ground for new trial, 33 ALR 550; 74 ALR 757; 158 ALR 1062.

Newly discovered evidence, corroborating testimony given only by a party or other interested witness, as ground for new trial, 158 ALR 1253.

Statements of witness in civil action secured after trial, inconsistent with his testimony, as basis for new trial on ground of newly discovered evidence, 10 ALR2d 381.

Evidence as to physical condition after trial as affecting right to new trial, 31 ALR2d 1236.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Facts or evidence forgotten at trial as newly discovered evidence which will warrant grant of new trial in civil case, 50 ALR2d 994.

Disclosure in criminal case of juror's political, racial, religious, or national origin prejudice against accused or witnesses as ground for new trial or reversal, 91 ALR2d 1120.

Facts or evidence forgotten at trial as newly discovered evidence which will warrant grant of new trial in criminal case, 92 ALR2d 992.

Perjury or wilfully false testimony of expert witness as basis for new trial on ground of newly discovered evidence, 38 ALR3d 812.

New trial on ground of newly discovered evidence going to amount of recovery, 55 ALR3d 696.

Recantation of testimony of witness as grounds for new trial—federal criminal cases, 94 ALR Fed. 60.

5-5-24. Error in instructions; objection required in civil cases; requested instructions; review of charges involving substantial error.

(a) Except as otherwise provided in this Code section, in all civil cases, no party may complain of the giving or the failure to give an instruction to the jury unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury. Objection need not be made with the particularity formerly required

of assignments of error and need only be as reasonably definite as the circumstances will permit. This subsection shall not apply in criminal cases.

(b) In all cases, at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may present to the court written requests that it instruct the jury on the law as set forth therein. Copies of requests shall be given to opposing counsel for their consideration prior to the charge of the court. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury but shall instruct the jury after the arguments are completed. The trial judge shall file with the clerk all requests submitted to him, whether given in charge or not.

(c) Notwithstanding any other provision of this Code section, the appellate courts shall consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, regardless of whether objection was made hereunder or not. (Ga. L. 1853-54, p. 46, § 1; Code 1863, § 3639; Code 1868, § 3664; Code 1873, § 3715; Ga. L. 1878-79, p. 150, § 1; Code 1882, § 3715; Civil Code 1895, § 5479; Penal Code 1895, § 1060; Civil Code 1910, § 6084; Penal Code 1910, § 1087; Code 1933, § 70-207; Ga. L. 1965, p. 18, § 17; Ga. L. 1966, p. 493, § 6; Ga. L. 1968, p. 1072, § 9.)

Cross references. — Granting of new trials in instances where judge expresses opinion as to what has or has not been proved or, in criminal actions, expresses his opinion as to guilt of accused, §§ 9-10-7 and 17-8-55.

Law reviews. — For article arguing for and against adoption of Rule 51 of the Federal Rules of Civil Procedure, so as to require objections to charges before verdict, see 1 Ga. St. B.J. 177 (1964). For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J. 451 (1965). For article, "1966

Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966). For article comparing sections of Ch. 11, T. 5 with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967). For article, "Synopsis of 1968 Amendments Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968).

For comment on *Bibb Transit Co. v. Johnson*, 107 Ga. App. 804, 131 S.E.2d 631 (1963), see 16 Mercer L. Rev. 347 (1964).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the issues dealt with in the provisions, decisions under former Civil Code 1910, § 6084, former Penal Code 1910, § 1087, and former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17, are included in the annotations for this Code section.

Section corresponds to federal rule. — Even prior to enactment, this section was in substance the rule which prevailed in federal courts. *Georgia Power Co. v. Maddox*, 113 Ga. App. 642, 149 S.E.2d 393 (1966), overruled on other grounds, *Christiansen v. Robertson*, 237 Ga. 711, 229 S.E.2d 472 (1976).

Subsection (b) is an adoption of Fed. R. Civ. P. 51, and thus federal cases provide guidance for resolving issues presented in its interpretation. *Daniels v. State*, 137 Ga. App. 371, 224 S.E.2d 60 (1976). But see *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

Subsection (b) of this section is an adoption of Fed. R. Civ. P. 51 and decisions of federal courts are authoritative though not binding on the question of its construction. *Seaney & Co. v. Katz*, 132 Ga. App. 456, 208 S.E.2d 333 (1974). But see *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

As subsection (b) is similar to Fed. R. Civ. P. 51, federal courts' application has persuasive influence. *Smith v. Poteet*, 127 Ga. App. 735, 195 S.E.2d 213 (1972). But see *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

Interpretations of Fed. R. Civ. P. 51 are not authority for construction of section. — Federal cases interpreting Fed. R. Civ. P. 51 are based upon substantially different law than this section and are not authority for construction of this section. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

Intended departure of section from Fed. R. Civ. P. 51 as to requests to charge. — Substance of paragraphs (a) and (b) of § 17 of Appellate Practice Act (Ga. L. 1965, p. 18) is embodied in a single paragraph in Fed. R. Civ. P. 51. It is thus manifest that the legislature in enacting § 17 of the Appellate Practice Act intended to depart from the federal rule in the matter of requests to charge. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

Distinction between failure to request charge and object to its omission, and failure to object to charge. — See *Thomas v. State*, 234 Ga. 615, 216 S.E.2d 859, answer conformed to, 136 Ga. App. 165, 220 S.E.2d 736 (1975).

Last clause of subsection (a) applies to charge, not to statements to accused in jury's presence. — Negative command of subsection (a) that its provisions shall not apply in criminal cases, is applicable to charge of court but is not applicable to statements made by court to accused in jury's presence but not a part of the charge to the jury. *Thomas v. State*, 234 Ga. 615, 216 S.E.2d 859, answer conformed to, 136 Ga. App. 165, 220 S.E.2d 736 (1975).

Objection or request to charge to restrict admission of evidence to special purpose. — Effect of admission of evidence should usually be made the subject of objection or of a request to charge where it is desired that it be restricted to a special purpose. *Deshazier v. State*, 155 Ga. App. 526, 271 S.E.2d 664 (1980).

Discretion of trial judge in declaring mistrial. — The trial judge in passing on motions for mistrial has a broad discretion, dependent on the circumstances of each case, which will not be disturbed unless manifestly abused. Furthermore, unless it is apparent that a mistrial is essential to preservation of the right of fair trial, the discretion of the trial judge will not be interfered with. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Claim to new trial on basis of form of verdict was waived where counsel for the plaintiff responded in the affirmative when asked by the court if the verdict was in proper order and responded in the negative when asked if there was anything further before the jury could be discharged, and where an alleged error in the court's charge to the jury did not result in "gross injustice" or the denial of a fair trial. *Ray v. Stinson*, 254 Ga. 375, 329 S.E.2d 502 (1985).

Citing law in closing argument. — The enactment of this Code section renders "reading the law" both unnecessary and incorrect, though it is counsel's right to state his legal position to the jury. *Freels v. State*, 195 Ga. App. 609, 394 S.E.2d 405 (1990).

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Transmission, Inc. v. Thompson, 173 Ga. App. 773, 328 S.E.2d 397 (1985); Crawford v. State, 254 Ga. 435, 330 S.E.2d 567 (1985); Walker v. Mitchell, 174 Ga. App. 738, 331 S.E.2d 82 (1985); Baldwin v. Associates Fin. Servs. of Am., Inc., 174 Ga. App. 795, 332 S.E.2d 21 (1985); John H. Smith, Inc. v. Teveit, 175 Ga. App. 565, 333 S.E.2d 856 (1985); Wilkes v. DOT, 176 Ga. App. 739, 337 S.E.2d 404 (1985); Pritchett v. Anding, 177 Ga. App. 34, 338 S.E.2d 503 (1985); Associated Software Consultants Org., Inc. v. Wysocki, 177 Ga. App. 135, 338 S.E.2d 679 (1985); Georgia Farm Bureau Mut. Ins. Co. v. Bestawros, 177 Ga. App. 667, 340 S.E.2d 645 (1986); Rivers v. State, 178 Ga. App. 310, 342 S.E.2d 781 (1986); King v. State, 178 Ga. App. 343, 343 S.E.2d 401 (1986); Boring v. McPherson, 178 Ga. App. 623, 344 S.E.2d 459 (1986); American Game & Music Serv., Inc. v. Knighton, 178 Ga. App. 745, 344 S.E.2d 717 (1986); Rice v. State, 178 Ga. App. 748, 344 S.E.2d 720 (1986); Carswell v. State, 179 Ga. App. 56, 345 S.E.2d 66 (1986); DOT v. Poole, 179 Ga. App. 638, 347 S.E.2d 625 (1986); Nash v. State, 179 Ga. App. 702, 347 S.E.2d 651 (1986); Almond v. State, 180 Ga. App. 475, 349 S.E.2d 482 (1986); Alexander v. State, 180 Ga. App. 640, 350 S.E.2d 284 (1986); White v. Archer Daniels Midland Co., 180 Ga. App. 829, 350 S.E.2d 788 (1986); Exley v. State, 180 Ga. App. 821, 350 S.E.2d 829 (1986); Beck v. State, 181 Ga. App. 681, 353 S.E.2d 610 (1987); Cox v. Cantrell, 181 Ga. App. 722, 353 S.E.2d 582 (1987); General Warranty Corp. Ins. Agents & Adm'rs v. Cameron-Hogan, Inc., 182 Ga. App. 434, 356 S.E.2d 83 (1987); Morris v. DeLong, 183 Ga. App. 124, 358 S.E.2d 285 (1987); Phillips v. State, 183 Ga. App. 194, 358 S.E.2d 480 (1987); Evans v. Harvey, 183 Ga. App. 284, 358 S.E.2d 668 (1987); Davis v. Charter By-The-Sea, Inc., 183 Ga. App. 213, 358 S.E.2d 865 (1987); Jones v. Davis, 183 Ga. App. 401, 359 S.E.2d 187 (1987); Shaw v. W.M. Wrigley, Jr., Co., 183 Ga. App. 699, 359 S.E.2d 723 (1987); Sharp v. State, 183 Ga. App. 641, 360 S.E.2d 50 (1987); Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418 (1987); Billingsley v. State, 183 Ga. App. 850, 360 S.E.2d 451 (1987); Dubberly v. P.F. Moon & Co., 184 Ga. App. 221, 361 S.E.2d 223 (1987); Precision Label Indus., Inc. v. Jones, 185 Ga. App. 161, 363 S.E.2d 605 (1987); Martin v. State, 185 Ga. App. 145, 363 S.E.2d 765 (1987); Carpet Transp., Inc. v. Dixie Truck Tire Co., 185 Ga. App. 181, 363 S.E.2d 840 (1987); Martini v. Nixon, 185 Ga. App. 328, 364 S.E.2d 49 (1987); Foskey v. Foskey, 257 Ga. 736, 363 S.E.2d 547 (1988); Mathis v. DOT, 185 Ga. App. 658, 365 S.E.2d 504 (1988); Westfall v. State, 185 Ga. App. 687, 365 S.E.2d 527 (1988); Smith v. State, 186 Ga. App. 303, 367 S.E.2d 573 (1988); Booth v. State, 186 Ga. App. 342, 367 S.E.2d 77 (1988); Davis v. Metropolitan Atlanta Rapid Transit Auth., 186 Ga. App. 366, 367 S.E.2d 885 (1988); Georgia Am. Ins. Co. v. Mills, 187 Ga. App. 128, 369 S.E.2d 768 (1988); Lissmore v. Kincaide, 188 Ga. App. 548, 373 S.E.2d 819 (1988); Pool Mkts. S., Inc. v. Moore, 189 Ga. App. 48, 374 S.E.2d 831 (1988); Kelly v. State, 189 Ga. App. 67, 375 S.E.2d 81 (1988); Little v. State, 189 Ga. App. 451, 376 S.E.2d 232 (1988); Martin v. State, 189 Ga. App. 483, 376 S.E.2d 888 (1988); Haun v. State, 189 Ga. App. 884, 377 S.E.2d 878 (1989); Martin v. State, 190 Ga. App. 486, 379 S.E.2d 170 (1989); Christopher v. State, 190 Ga. App. 393, 379 S.E.2d 205 (1989); Waters v. Spell, 190 Ga. App. 790, 380 S.E.2d 55 (1989); McCounly v. State, 191 Ga. App. 266, 381 S.E.2d 552 (1989); Dixon v. State, 191 Ga. App. 410, 382 S.E.2d 357 (1989); Worley v. State, 193 Ga. App. 58, 386 S.E.2d 879 (1989); Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989); Hood v. State, 193 Ga. App. 701, 389 S.E.2d 264 (1989); Fidelity Nat'l Bank v. Kneller, 194 Ga. App. 55, 390 S.E.2d 55 (1989); Adcock v. State, 194 Ga. App. 627, 391 S.E.2d 438 (1990); Doctors Hosp. v. Bonner, 195 Ga. App. 152, 392 S.E.2d 897 (1990); Milam v. Attaway, 195 Ga. App. 496, 393 S.E.2d 753 (1990); Isaacs v. Williams Bros., 195 Ga. App. 812, 395 S.E.2d 11 (1990); Joe N. Guy Co. v. Valiant Steel & Equip., Inc., 196 Ga. App. 20, 395 S.E.2d 310 (1990); N.D.T., Inc. v. Connor, 196 Ga. App. 314, 395 S.E.2d 901 (1990); Strickland v. DOT, 196 Ga. App. 322, 396 S.E.2d 21 (1990); Sycamore Pellet Sys. v. Southeastern Steam, Inc., 196 Ga. App. 717, 397 S.E.2d 6 (1990); Harrison v. Ellis, 199 Ga. App. 199, 404 S.E.2d 348 (1991); O'Quinn v. Southeast Radio Corp., 199 Ga. App. 491, 405 S.E.2d 314 (1991); Cobble v. State, 199 Ga. App. 29, 404 S.E.2d 134 (1991); Holmes v. Drucker, 201 Ga. App. 687, 411 S.E.2d 728 (1991);

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Anepohl v. Ferber, 202 Ga. App. 552, 415 S.E.2d 9 (1992); Crawford v. State, 203 Ga. App. 215, 416 S.E.2d 820 (1992); Summit-Top Dev., Inc. v. Williamson Constr., Inc., 203 Ga. App. 460, 416 S.E.2d 889 (1992); McDevitt & Street Co. v. K-C Air Conditioning Serv., Inc., 203 Ga. App. 640, 418 S.E.2d 87 (1992); Pope v. Pressley, 204 Ga. App. 115, 418 S.E.2d 635 (1992); Hicks v. Doe, 206 Ga. App. 596, 426 S.E.2d 174 (1992); Welch v. State, 207 Ga. App. 27, 427 S.E.2d 22 (1992); Crosby v. Spencer, 207 Ga. App. 487, 428 S.E.2d 607 (1993); Hesler v. State, 208 Ga. App. 495, 431 S.E.2d 138 (1993); Amalgamated Transit Union Local 1324 v. Roberts, 263 Ga. 405, 434 S.E.2d 450 (1993); McDuffie v. State, 210 Ga. App. 112, 435 S.E.2d 452 (1993); Wilson v. Muhanna, 213 Ga. App. 704, 445 S.E.2d 540 (1994); Nelson v. State, 213 Ga. App. 641, 445 S.E.2d 543 (1994).

Requested Instructions

1. In General

The purpose of the written request to charge as required by this section requires such desired requests to be in writing in order to inform the court as to the jury instructions to be given and this section, as amended, refers to all cases both civil and criminal. *Whately v. State*, 162 Ga. App. 106, 290 S.E.2d 316 (1982).

Absent request for specific charge, and objection to failure to charge, error not reversible. *Herring v. McLemore*, 248 Ga. 808, 286 S.E.2d 425 (1982).

When litigant need not request instructions. — This section does not relieve a litigant from the necessity of requesting instructions except in those circumstances where the omission is clearly harmful and erroneous as a matter of law in that it fails to provide the jury with the proper guidelines for determining guilt or innocence. *Jackson v. State*, 161 Ga. App. 650, 289 S.E.2d 525 (1982).

Requests to charge must be timely and properly submitted in writing. *Slaughter v. Linder*, 122 Ga. App. 144, 176 S.E.2d 450 (1970).

Changes to section have not made it un-

necessary to file written requests to charge. *Dixon v. State*, 224 Ga. 636, 163 S.E.2d 737 (1968).

It is never error to deny oral request to charge. *Slaughter v. Linder*, 122 Ga. App. 144, 176 S.E.2d 450 (1970); *Hudson v. Columbus*, 139 Ga. App. 789, 229 S.E.2d 671 (1976).

Requests to charge must be made prior to arguments to jury. — On appeal a party may not complain about court's failure to charge where no written requests to charge were received prior to arguments to jury. *Ledbetter Bros. v. Holmes*, 122 Ga. App. 514, 177 S.E.2d 824 (1970).

Where request is not timely or is not warranted by evidence. — Even though written request to charge has been made by state or accused, trial court's failure to so charge is not error if (1) written request to charge has not been made at or before close of evidence, or (2) evidence does not warrant such requested charge. *Bouttry v. State*, 242 Ga. 60, 247 S.E.2d 859 (1978).

There was no abuse of discretion in the court's denial of the defendant's request that the state furnish proposed jury instructions 24 hours before trial. *Pruitt v. State*, 258 Ga. 583, 373 S.E.2d 192 (1988), cert. denied, 493 U.S. 1093, 110 S. Ct. 1170, 107 L. Ed. 2d 1072 (1990).

Where a criminal defendant was tried on charges of kidnapping and murder, and after the court had recharged the jury three times on kidnapping, the defendant, for the first time, requested a charge on false imprisonment; the trial court did not err in failing to give the defendant's requested charge on false imprisonment; the request was not made at or before the close of the evidence, and the evidence did not authorize the charge. *Peebles v. State*, 260 Ga. 165, 391 S.E.2d 639 (1990).

Request must be correct, legal, apt, even perfect, and precisely adjusted to some principle involved in case. *Slaughter v. Linder*, 122 Ga. App. 144, 176 S.E.2d 450 (1970); *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Requested charge should be given only where it embraces correct and complete principle of law which has not been included in general instructions given and where request is pertinent and adjusted to facts of case. *Gates v. Southern Ry.*, 118 Ga. App. 201, 162 S.E.2d 893 (1968).

Unless request is all legal and pertinent, court need not give any part of it. *Slaughter v. Linder*, 122 Ga. App. 144, 176 S.E.2d 450 (1970).

Denial of request to charge is proper if any portion of it is inapt or incorrect. *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Legal, pertinent, written requests to charge should generally be granted. — Some issues cannot be raised except by virtue of special pleading, but in general under this section, if request is legal, pertinent, and in writing it should be given. *Atlanta Coca-Cola Bottling Co. v. Burke*, 109 Ga. App. 53, 134 S.E.2d 909 (1964) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Request to charge must be in writing. *Dumas v. Stafford & Son*, 22 Ga. App. 365, 95 S.E. 1009 (1918).

Requested charge which does not accurately state a correct principle of law should be refused. *Georgia & Fla. Ry. v. Newton*, 140 Ga. 463, 79 S.E. 142 (1913) (decided under former Penal Code 1910).

Requested charge not applicable to facts should be refused. *Smith v. Satilla Pecan Orchard & Stock Co.*, 152 Ga. 538, 110 S.E. 303 (1922) (decided under former Penal Code 1910).

If requested charge is not accurately adjusted to facts of case, request must be denied. *Emory Univ. v. Lee*, 97 Ga. App. 680, 104 S.E.2d 234 (1958) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Argumentative requests. — Request to charge, though correct, is properly refused if it is in the slightest degree argumentative. *Emory Univ. v. Lee*, 97 Ga. App. 680, 104 S.E.2d 234 (1958) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

That requested charge is substantially correct is not enough; it must contain a perfect statement of law applicable to question dealt with, to render it erroneous for court to refuse to give it in charge to the jury. *Turnipseed v. State*, 53 Ga. App. 194, 185 S.E. 403 (1936) (decided under former Code 1933, § 70-207, as it read prior to its

repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Request to charge is not perfect when inference is required to make it correct, and there is no error in refusing to charge such request. *Evans v. Caldwell*, 52 Ga. App. 475, 184 S.E. 440 (1936) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17), *aff'd*, 184 Ga. 203, 190 S.E. 582 (1937) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Purpose for requiring that copies of jury instruction requests be given to opposing counsel. — Requirement that copies of jury instruction requests be given to opposing counsel at time they are submitted to court can serve no useful purpose other than to afford opposing counsel an opportunity to argue to the court, before granting or refusing of such request, his contentions with respect to whether such requested charges should be given. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

Reason subsection (b) contains no provision relating to objections to refusals of requests to charge. — Unlike subsection (a), subsection (b) contains no provision relating to objections to refusals to grant requests to charge. This is because when party has presented to court written requests that it instruct jury on law as set forth therein, court normally affords such party at that time an opportunity to state grounds upon which he contends such submitted request to charge should be given. The court is thus at that time put on notice as to the grounds upon which it is urged such requests to charge should be given. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

Extent of exemption of criminal defendants as to requests for instructions. — While this section exempts defendant in criminal case from strict requirements imposed on litigants in civil cases to preserve issue on giving of or failure to give instructions to jury, it does not relieve him from necessity of requesting instructions, or making timely objection in trial court on failure to give instructions, except in those circumstances where omission is clearly harmful and erroneous as a matter of law in that it

Requested Instructions (Cont'd)**1. In General (Cont'd)**

fails to provide jury with proper guidelines for determining guilt or innocence. *Spear v. State*, 230 Ga. 74, 195 S.E.2d 397 (1973); *Sanders v. State*, 138 Ga. App. 774, 227 S.E.2d 504 (1976); *Lundy v. State*, 139 Ga. App. 536, 228 S.E.2d 717 (1976); *Weatherington v. State*, 139 Ga. App. 795, 229 S.E.2d 676 (1976); *Dorsey v. State*, 141 Ga. App. 68, 232 S.E.2d 405 (1977); *Mullins v. State*, 144 Ga. App. 22, 240 S.E.2d 297 (1977); *Richardson v. State*, 144 Ga. App. 416, 240 S.E.2d 917 (1977); *Key v. State*, 147 Ga. App. 800, 250 S.E.2d 527 (1978); *Byrd v. State*, 156 Ga. App. 522, 275 S.E.2d 108 (1980); *Brown v. State*, 157 Ga. App. 473, 278 S.E.2d 31 (1981); *Carr v. State*, 183 Ga. App. 36, 357 S.E.2d 816, cert. denied, 183 Ga. App. 905, 357 S.E.2d 816 (1987).

While this section exempts defendant in criminal trial from strict requirements imposed on litigants in civil cases to preserve issue on giving or failure to give instructions, this does not relieve him from necessity of requesting clarifying instructions or making clear his objection so that trial court can exercise opportunity to correct possible errors at most opportune point in proceedings and thus allow review by appellate court. *Bradham v. State*, 148 Ga. App. 89, 250 S.E.2d 801 (1978), aff'd in part and rev'd in part on other grounds, 243 Ga. 638, 256 S.E.2d 331 (1979).

This section does not relieve the criminal defendant of the necessity of requesting instructions except in those circumstances where omission is clearly harmful and erroneous as a matter of law in that it fails to provide jury with proper guidelines for determining guilt or innocence. *Key v. State*, 147 Ga. App. 800, 250 S.E.2d 527 (1978).

Although a defendant in a criminal case is exempted from the requirements imposed on civil litigants to object to the giving of or failure to give jury instructions, he is not relieved of the necessity of requesting instructions except where the omission is clearly harmful and erroneous as a matter of law in that it fails to provide the jury with the proper guidelines for determining guilt or innocence. *Sosebee v. State*, 169 Ga. App. 370, 312 S.E.2d 853 (1983).

2. Judge's Duty Regarding Proposed Action on Requested Charges

Purpose of requirement that judge inform parties of action on requested charges. — Requirement of subsection (b) that judge inform parties prior to final argument of his action on requested charges is designed to enable attorneys to argue their case to jury intelligently and on basis of guiding legal principles under which argument should be made. *Daniels v. State*, 137 Ga. App. 371, 224 S.E.2d 60 (1976).

Subsection (b) provides, in part, that the trial court "shall inform counsel of its proposed action upon the requests prior to their arguments to the jury" This is a mandatory rule, designed to permit counsel to argue the case intelligently before the jury. *King v. State*, 201 Ga. App. 391, 411 S.E.2d 278, cert. denied, 201 Ga. App. 904, 411 S.E.2d 278 (1991).

Failure to so inform parties not reversible error where no harm done. — Trial judge's failure to inform counsel of his intention regarding charges to jury pursuant to subsection (b) is not reversible error where record fails to show harm to party involved. *Braswell v. Owen of Ga., Inc.*, 128 Ga. App. 528, 197 S.E.2d 463 (1973); *Brown v. State*, 163 Ga. App. 661, 295 S.E.2d 581 (1982).

The mere failure to inform counsel of the court's intention to charge is not such an omission as will require the grant of a new trial in the absence of prejudice. *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Trial court's failure to adhere to the mandate of subsection (b) was harmless error, where counsel was not prevented from arguing the substance of any of the requests to charge and the court charged on all legal principles contained in the requests. *King v. State*, 201 Ga. App. 391, 411 S.E.2d 278, cert. denied, 201 Ga. App. 904, 411 S.E.2d 278 (1991).

For reversal to be obtained for such inadvertent oversight of court failing to inform counsel as to court's proposed action on opposing party's requests to charge, it is necessary to show substantial prejudice to have resulted. *Smith v. Poteet*, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

Failure to inform counsel of court's proposed action on refusal to charge is not

reversible error per se; in order to warrant reversal or new trial for failure to comply with this rule, prejudice must be shown. *Seaney & Co. v. Katz*, 132 Ga. App. 456, 208 S.E.2d 333 (1974).

Where closing arguments were already completed at the time counsel called attention to the fact the trial court had not gone over requests to charge, no harmful error resulted from the court's admission. *Latimore v. State*, 170 Ga. App. 848, 318 S.E.2d 722 (1984).

Judge's noncompliance with subsection (b) not necessarily reversible error. — In absence of request by counsel to be informed of judge's proposed action on requested charges, noncompliance with subsection (b) is not, in and of itself, reversible error. *Post-Tensioned Constr., Inc. v. VSL Corp.*, 143 Ga. App. 148, 237 S.E.2d 618 (1977).

In the absence of any request by counsel to be informed of the judge's proposed action on requested charges, noncompliance with this section is not, in and of itself, reversible error. Thus, when counsel embark upon their summation without any request for such information, the trial judge may usually infer that they envisage no need for such information and treat the requirement as waived. *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Prejudice must be shown to warrant reversal or new trial for noncompliance with subsection (b). — Even if proper request is made, in order to warrant reversal or new trial for failure to comply with subsection (b) of this section, prejudice must be shown. *Post-Tensioned Constr., Inc. v. VSL Corp.*, 143 Ga. App. 148, 237 S.E.2d 618 (1977).

The failure to inform counsel of the court's proposed action on the refusal to charge is not reversible error per se. In order to warrant a reversal or new trial for failure to comply with this rule, prejudice must be shown. The burden is on the complaining party to show harm. *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Judge's failure to file written requests with clerk not reversible error where no harm done. — Where trial court violated section in failing to file written requests to charge with clerk, if no harm has been shown trial court should not be reversed. *Nelson v. Seaboard Coast Line R.R.*, 125 Ga. App. 764,

188 S.E.2d 887 (1972).

Where trial judge misleads counsel regarding intended charge. — Where trial judge misleads counsel as to intended charge, severe injustice may result and counsel should be given opportunity, if justice requires, to reargue facts in light of changed law of case. *Daniels v. State*, 137 Ga. App. 371, 224 S.E.2d 60 (1976).

Where defense counsel had been misled as to intended charge, his remedy is to request to reargue the facts in the light of the charge given. *Hudson v. State*, 150 Ga. App. 126, 257 S.E.2d 312 (1979).

Beginning summation without inquiry into intended action on proposed charges. — When counsel embark upon their summations without any request for information on court's proposed action on opposing party's requests to charge, trial judge may usually infer that they envisage no need for such information and treat requirement as waived. *Smith v. Poteet*, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

Failure to inform counsel must be objected to. — The failure of the trial judge to inform counsel as to which of the requested charges would be included in the trial court's instructions to the jury is clearly error. However, to effect a reversal of the case because of the trial judge's failure to comply with the provisions of this section it is necessary that counsel make a proper objection and perfect the record so that the appellate court will have the issue properly before it for determination. *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

3. Application

Requirements for requests to charge extend to pertinent Code sections which party desires included in charge. *Slaughter v. Linder*, 122 Ga. App. 144, 176 S.E.2d 450 (1970).

Oral request that court charge excerpt from decision of appellate court is insufficient to meet requirement in subsection (b) of this section that requests to instruct be written. *Norman v. State*, 121 Ga. App. 753, 175 S.E.2d 119 (1970), cert. denied, 401 U.S. 956, 91 S. Ct. 981, 28 L. Ed. 2d 240 (1971).

Request to charge submitted after closing arguments. — Where, at close of evidence, party made oral request to charge, which was denied, and written request to charge was

Requested Instructions (Cont'd)**3. Application (Cont'd)**

filed by party after conclusion of closing arguments to jury, trial court did not err in refusing to give requested charge. *Bouttry v. State*, 242 Ga. 60, 247 S.E.2d 859 (1978).

Request submitted after commencement of opposing party's argument. — Section clearly contemplates that any requests for instructions be submitted before argument begins, and where requests of counsel for defendant were not submitted to court until after solicitor general (now district attorney) commenced his argument, such requests were not timely submitted and it was not error for court to refuse to give them. *Curtis v. State*, 224 Ga. 870, 165 S.E.2d 150 (1968).

If one of several requests presented en bloc is erroneous court not required to give any. — Where series of propositions are presented en bloc in a single request to charge, the court is not required to give them or any part of them, if any one is erroneous or inapplicable to case. *Western Union Tel. Co. v. Owens*, 23 Ga. App. 169, 98 S.E. 116 (1919) (decided under former Penal Code 1910), *Port Wentworth Term. Corp. v. Leavitt*, 28 Ga. App. 82, 110 S.E. 686 (1922).

It is not error to refuse request to charge when part thereof states principle of law inapplicable to case. *Johns v. State*, 79 Ga. App. 429, 54 S.E.2d 142 (1949) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Charge need not be in exact language requested. — It is no longer essential that court give instruction in exact language of request; requirement of the law is satisfied where court instructs jury substantially upon principles embodied in request. *Hardwick v. Price*, 114 Ga. App. 817, 152 S.E.2d 905 (1966); *Shelton v. Rose*, 116 Ga. App. 37, 156 S.E.2d 659 (1967); *Kendrick v. State*, 123 Ga. App. 785, 182 S.E.2d 525 (1971); *Jackson v. Miles*, 126 Ga. App. 320, 190 S.E.2d 565 (1972); *Bailey v. Todd*, 126 Ga. App. 731, 191 S.E.2d 547 (1972), cert. denied, 409 U.S. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973); *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973); *Brookhaven Supply Co. v. DeKalb County*, 134 Ga. App. 878, 216 S.E.2d 694 (1975).

It is no longer necessary to give exact language of requests to charge when same principles are fairly given to jury in general charge of court. *Shirley v. State*, 245 Ga. 616, 266 S.E.2d 218 (1980).

Failure of court to give requested charge in exact language requested where charge given covered same principle of law is not ground for new trial. *Harkness v. Harkness*, 228 Ga. 184, 184 S.E.2d 566 (1971).

Former rule that pertinent request to charge must be given in exact language requested notwithstanding that trial judge had already charged substantially on issue elsewhere has been removed by this section. *Southern Ry. v. Grogan*, 113 Ga. App. 451, 148 S.E.2d 439 (1966).

If it can be determined that point at issue was presented to jury in substantially as clear and understandable a manner as that requested, keeping in mind that a jury is a lay audience, there should be no reversal where language conveys correctly the intent of the law and is so framed as to be applied with understanding to fact situation. *Jackson v. Miles*, 126 Ga. App. 320, 190 S.E.2d 565 (1972).

Court is not bound to instruct in language of request, or in immediate response to it, if in substance at any time the instruction desired is given. *Carnes v. State*, 115 Ga. App. 387, 154 S.E.2d 781, cert. denied, 389 U.S. 928, 88 S. Ct. 287, 19 L. Ed. 2d 279 (1967).

Since the repeal and reenactment of this section by Ga. L. 1965, p. 18, § 17, there is presently no requirement in this state that the court instruct the jury in the exact language of a request, even though the request may be correct as an abstract principle of law which is directly applicable to a material issue, where the charge given by the court substantially covers the same principles. *Gay v. City of Rome*, 157 Ga. App. 368, 277 S.E.2d 741 (1981).

Simply because a request to charge is apt, correct and pertinent, it is not necessarily error to fail to charge it, but test is whether court substantially covered principles embodied therein or whether it was sufficiently or substantially covered by general charge. *Seaboard Coast Line R.R. v. Thomas*, 125 Ga. App. 716, 188 S.E.2d 891, aff'd, 229 Ga. 301, 190 S.E.2d 898 (1972).

It is not error to refuse requested charge

where general instructions cover substance of request. *Gates v. Southern Ry.*, 118 Ga. App. 201, 162 S.E.2d 893 (1968).

Refusal of request is not error where correct instruction by trial court dealing with principles of law embodied in request, although in more abstract terminology, is given. *Johnson v. Myers*, 118 Ga. App. 773, 165 S.E.2d 739 (1968).

Judge need not give requested charge where same matter is covered in charge given. — Reversal will not be granted because trial judge refused to give certain requested instructions to jury, where same matter was fully and fairly presented in charge given. *Candler v. Smith*, 50 Ga. App. 667, 179 S.E. 395 (1935) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

History of power of trial judge to refuse requested charges covered by general charge. — See *Bibb Transit Co. v. Johnson*, 107 Ga. App. 804, 131 S.E.2d 631 (1963) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Refusal to charge in accordance with oral request is equivalent of mere failure to charge. *Ware v. State*, 156 Ga. 749, 120 S.E. 528 (1923) (decided under former Penal Code 1910).

Trial court is not obligated to rewrite instruction which either party requests to be given. *Tatum v. State*, 57 Ga. App. 849, 197 S.E. 51 (1938) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Party who has requested a charge cannot complain thereof. *Laing v. Bodiford*, 25 Ga. App. 460, 103 S.E. 743 (1920) (decided under former Penal Code 1910).

Charges given at request or insistence of counsel for defendant furnished no ground for granting new trial at his instance. *Coleman v. State*, 141 Ga. 731, 82 S.E. 228 (1914) (decided under former Penal Code 1910).

Where party in request to charge takes position at trial that there was a certain issue to be submitted to the jury, he cannot justly complain in his motion for new trial that there was no such issue because evidence was undisputedly to the contrary. *Davis v. Laird*,

108 Ga. App. 729, 134 S.E.2d 467 (1963) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Where incompleteness in charge arose from party's requested instructions. — Party will not be heard to complain that trial court failed to give complete charge to jury where incompleteness arose from instructions requested by him and there was no request or objection regarding such incompleteness. *Marlow v. Lanier*, 157 Ga. App. 184, 276 S.E.2d 867 (1981).

Where defendant requests that certain charge not be given he may not thereafter complain that trial court erred by not delivering proper charge. *Burton v. State*, 151 Ga. App. 176, 259 S.E.2d 176 (1979).

Criminal defendant's failure to request charge or object to its omission is decisive against him. — Where criminal defendant fails to request charge, or fails to object to trial court's omission to charge, such failure to request or object has been decisive against him. *Thomas v. State*, 234 Ga. 615, 216 S.E.2d 859, answer conformed to, 136 Ga. App. 165, 220 S.E.2d 736 (1975).

Refusal of proper request on doctrine of avoidance, when raised by evidence, is reversible error. *Kroger Co. v. Roadrunner Transp., Inc.*, 634 F.2d 228 (5th Cir. 1981).

Refusal of requested charge on comparative negligence. — Where court refused defendant's request to charge on comparative negligence, and evidence created issues on defenses that plaintiff failed to exercise ordinary care, trial court erred in refusing upon request to charge jury on application of comparative negligence rule. *Crafton v. Livingston*, 114 Ga. App. 161, 150 S.E.2d 371 (1966).

State or accused may request charge on lesser crimes. — State or accused may, by written application to trial judge at or before close of evidence, request him to charge on lesser crimes than are included in those set forth in indictment or accusation, and his failure to so charge as requested, if evidence warrants such requested charge or charges, shall be error. *Bouttry v. State*, 242 Ga. 60, 247 S.E.2d 859 (1978).

Entitlement to charge regarding polygraph results admitted at trial. — When polygraph results are admitted at trial, either party is entitled, upon request, to have jury charged

Requested Instructions (Cont'd)**3. Application (Cont'd)**

concerning meaning of this evidence. *Ross v. State*, 245 Ga. 173, 263 S.E.2d 913 (1980).

Court has discretion to hear objections to requests to charge. — Subsection (b) does not require that counsel be offered opportunity before charge of court to object to requests to charge, although court, in its discretion, may hear objections to requests at that time. *Windsor Forest, Inc. v. Rocker*, 115 Ga. App. 317, 154 S.E.2d 627 (1967).

Restatement of grounds supporting given charge. — Court is afforded every opportunity to be informed as to contention of respective parties concerning jury instruction requests and no useful purpose could possibly be served by requiring that ground upon which counsel contends charge should be given be repeated after court has announced to counsel its decision that requested charge will not be given and has instructed jury omitting such requested charge. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

Party submitting request to charge is not required to restate grounds of objection to refusal to charge timely submitted written requests after court has heard argument on request and had made its ruling thereon. *Meadows v. Oates*, 156 Ga. App. 242, 274 S.E.2d 634 (1980).

Rule XV of the Local Rules of the Southern Judicial Circuit, which provides that "All requests to charge shall be filed in writing with the court, in duplicate and with supporting authorities, prior to the introduction of any evidence by any party," is not in conflict with this section, which specifically permits the trial court to select an earlier time than the close of the evidence for the submission of requests to charge. *Walker v. State*, 168 Ga. App. 130, 308 S.E.2d 404 (1983).

Where trial court gives to jury defendant's previously rejected charge on circumstantial evidence, but where defense counsel is not misled or uninformed other than as to this charge, and no request is made by defense counsel to argue the case as to the circumstantial evidence rule to the jury, the initial rejection of the requested instruction is not, by itself, a proper basis for the grant of a new trial. *Thomas v. State*, 168 Ga. App. 587, 309 S.E.2d 881 (1983).

Failure to request charge as to constitutional right not to testify. — In the absence of a timely written request, the trial court does not err in failing to charge the jury that the defendant has a constitutional right not to testify and that no inference could be made as a result of his failure to testify on his own behalf. *Stephens v. State*, 157 Ga. App. 414, 278 S.E.2d 70 (1981).

Failure to instruct on a lesser included crime is not error, regardless of whether the evidence would have authorized or demanded such a charge, in the absence of a written request. *Daniel v. State*, 248 Ga. 271, 282 S.E.2d 314 (1981).

In the absence of a timely, written request, the failure to charge on a lesser-included offense is not error. *Partridge v. State*, 187 Ga. App. 325, 370 S.E.2d 173 (1988).

A timely, written request to charge a lesser included offense must be made by application to the trial judge at or before the close of the evidence. *Jackson v. State*, 213 Ga. App. 170, 444 S.E.2d 126 (1994).

Failure to give unrequested instruction on collateral issue. — Defendant cannot complain about the trial court's failure to give an unrequested instruction on a collateral issue, especially when the omission is not clearly harmful and erroneous as a matter of law. *Schubert v. State*, 160 Ga. App. 227, 286 S.E.2d 514 (1981).

In aggravated assault prosecution, court complied with this section by informing counsel before closing argument of its proposed action on the requests to charge, by charging the jury after the arguments, and by filing with the clerk all of the submitted requests to charge. *Simmons v. State*, 172 Ga. App. 695, 324 S.E.2d 546 (1984).

Failure to charge on automatism. — The court did not err by failing to charge on automatism, absent a written request for such a charge. *Pope v. State*, 256 Ga. 195, 345 S.E.2d 831 (1986), cert. denied, 484 U.S. 873, 108 S. Ct. 207, 98 L. Ed. 2d 159 (1987).

Request after court's failure to charge sua sponte. — Defendant was not erroneously denied the opportunity for re-argument in light of the trial court's decision to charge the jury as to robbery by intimidation, where the charge on robbery by intimidation was given as the result of the state's objection to the trial court's failure to give a charge sua sponte, not as the result of the trial court's

subsequent decision to give a request that had earlier been refused. *Turner v. State*, 180 Ga. App. 141, 348 S.E.2d 572 (1986).

Incomplete and inaccurate request not honored. — Where defendant requested a charge on the defense of good character but his request was not a complete and, consequently, not an accurate statement of the law concerning “good character,” the court was not bound to honor the request. Only exceptional cases require the charge without a request of good character. *Williams v. State*, 187 Ga. App. 355, 370 S.E.2d 210 (1988).

Failure to inform counsel of proposed action on requests. — Trial court’s failure to comply with the requirement that counsel be informed before closing argument of the trial court’s proposed action on requests for jury instructions did not require reversal of defendant’s conviction, where the jury charges involved were not supported by the evidence at trial and the error caused no harm to defendant. *Bentley v. State*, 261 Ga. 229, 404 S.E.2d 101 (1991).

Jury Charge

1. In General

Perfection not required. — Dialectical perfection, metaphysical nicety, abstract inerrancy, are not expected or required of state trial courts. *Smith v. Poteet*, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

Charge is responsibility of court and not of counsel. *A-1 Bonding Serv., Inc. v. Hunter*, 125 Ga. App. 173, 186 S.E.2d 566 (1971), *aff’d*, 229 Ga. 104, 189 S.E.2d 392 (1972).

In all civil cases the jury shall receive the law exclusively from trial judge and any departure from this rule will constitute reversible error. *Metropolitan Publishers Representatives, Inc. v. Arnsdorff*, 153 Ga. App. 877, 267 S.E.2d 260 (1980).

Reading of law to court in presence of jury by counsel constitutes reversible error in light of enactment of this section. *Central of Ga. R.R. v. Sellers*, 129 Ga. App. 811, 201 S.E.2d 485 (1973).

Court’s duty as to charging jury is to charge on law as to controlling, material, substantial, and vital issues. *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Charge must include law of case pertaining to substantial issues, whether or not requested. — Law of case must be given to

jury to extent of covering substantial issues made by evidence, whether requested or not, or attention be called to it or not; otherwise verdict will be set aside. *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Charges must be relevant and necessary. — A trial court is required “after arguments are completed” to instruct comprehensively on the law applicable to the case, i.e., those charges which are relevant and necessary to weigh the evidence and enable the jury to discharge its duty, and which would constitute error if not given. *Griffith v. State*, 264 Ga. 326, 444 S.E.2d 794 (1994).

Instructions are sufficient which substantially cover issues made by pleadings and evidence, absent a timely written request. *Siegel v. 1156 Woodland, Inc.*, 115 Ga. App. 178, 154 S.E.2d 263 (1967).

Charge should be sufficiently clear to be understood. — It is not necessary in considering a charge to assume a possible adverse construction, but charge that is sufficiently clear to be understood by jurors of ordinary understanding is all that is required. *Clark v. State*, 153 Ga. App. 829, 266 S.E.2d 577 (1980).

Court should not give conflicting rules of law in charge and leave jury to choose between them. *Johnson v. State*, 148 Ga. App. 702, 252 S.E.2d 205 (1979).

Jury instructions must always be viewed as a whole. *Shirley v. State*, 245 Ga. 616, 266 S.E.2d 218, *cert. denied*, 449 U.S. 879, 101 S. Ct. 227, 66 L. Ed. 2d 102 (1980).

Charges may be made prior to end of evidence’s submissions. — It is not error for certain charges to be made to the jury prior to and during the receipt of evidence, nor is it error to instruct the jury concerning their duties before any evidence is received. *Hammond v. State*, 169 Ga. App. 97, 311 S.E.2d 523 (1983).

Charge containing two distinct propositions which conflict with each other is calculated to leave the jury in such a confused condition of mind that they cannot render an intelligible verdict, and requires the grant of a new trial. *Clements v. Clements*, 247 Ga. 787, 279 S.E.2d 698 (1981).

Whole charge may be sound even if disjointed fragments are objectionable. — While the specific portion of a charge of which complaint is made, when torn asun-

Jury Charge (Cont'd)**1. In General (Cont'd)**

der and considered as a disjointed fragment, may be objectionable, when put together and considered as a whole, the charge may be perfectly sound. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

Charge is intended to state and explain law. — Province of jury is to ferret out and determine questions of fact through their own process of reasoning. *Emory Univ. v. Lee*, 97 Ga. App. 680, 104 S.E.2d 234 (1958) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Charge must cover substantial, controlling issues made by pleadings and evidence. — It is duty of trial judge in every case, with or without request, to charge jury fully and correctly upon all substantial and controlling issues made by pleadings and evidence. *Hilburn v. Hilburn*, 210 Ga. 497, 81 S.E.2d 1 (1954) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

It is duty of court, even without request, to give appropriate instructions on every substantial and controlling issue raised by pleadings and evidence. *McCrackin v. McKinney*, 52 Ga. App. 519, 183 S.E. 831 (1936) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Purpose of requiring written instructions is to prevent dispute as to what was charged. *Citizens Bank v. Fort*, 15 Ga. App. 427, 83 S.E. 678 (1914) (decided under former Penal Code 1910).

It is necessary that it explicitly appear to jury that judge himself gives instructions. *Georgia R.R. & Banking Co. v. Flowers*, 108 Ga. 795, 33 S.E. 874 (1899); *Blandon v. State*, 6 Ga. App. 782, 65 S.E. 842 (1909).

Correctness of charge must be determined by the whole, taken together. — If, taking all instructions collectively, the law seems to have been properly expounded to jury, judgment will not be reversed, though some one opinion may be erroneous, as correctness of charge must be determined by the whole, taken together. *Ellis v. Britt*, 181 Ga. 442, 182 S.E. 596 (1935) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by

Ga. L. 1965, p. 18, § 17).

Charge though abstractly correct is nevertheless erroneous unless authorized by evidence. *Groover v. Cudahy Packing Co.*, 61 Ga. App. 707, 7 S.E.2d 287 (1940) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

To justify charge on given subject, there need not be direct evidence on that point; it is enough if there be something from which a legitimate process of reasoning can be carried on in respect to it. *Hawkins v. State*, 80 Ga. App. 496, 56 S.E.2d 315 (1949) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

General instructions previously given may warrant refusal of specific charge. *Bank of Lafayette v. Phipps*, 30 Ga. App. 769, 119 S.E. 427 (1923) (decided under former Penal Code 1910).

One cannot complain of charge which gives him unwarranted defense. *Stripling v. Calhoun*, 98 Ga. App. 354, 105 S.E.2d 923 (1958) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Legally correct, pertinent charge not rendered erroneous by failure to charge another pertinent principle. — Charge that is otherwise legally correct, applicable, and pertinent to issues in case is not rendered erroneous by failure of court to charge another pertinent legal principle. *Wilson v. Harrell*, 87 Ga. App. 793, 75 S.E.2d 436 (1953) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Excerpt from charge of trial court which is correct in itself is not rendered erroneous because some other essential and correct principle of law is not included therein or added thereto. *Hudson v. Cole*, 102 Ga. App. 300, 115 S.E.2d 825 (1960) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

In such a case, the motion for a new trial should assign error on the failure of the court to charge the other essential and correct principle of law involved and not on the charge given. *Hudson v. Cole*, 102 Ga. App. 300, 115 S.E.2d 825 (1960) (decided under former Code 1933, § 70-207, as it read prior

to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

To cure erroneous charge. — Fact that judge also gave correct charge on avoiding negligence did not cure error when he did not call jury's attention to erroneous charge and correct or retract it. *Brooks v. Wofford*, 88 Ga. App. 731, 77 S.E.2d 563 (1953) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

It is not presumed that jury pays more attention to incorrect charges than to others. *Fievet v. Curl*, 96 Ga. App. 535, 101 S.E.2d 181 (1957) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Court may, in its discretion, recharge jury without request from them. *Hyde v. State*, 196 Ga. 475, 26 S.E.2d 744 (1943) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Court has discretion to supplement charge or give additional charge after jury retires. — Court, after having seemingly completed the charge and instructed the jury to retire, has discretion in supplementing charge or in giving additional charge to jury. *Southern Ry. v. Lee*, 59 Ga. App. 316, 200 S.E. 569 (1938) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Judge may charge contentions made by pleadings. — It was not reversible error to state in charge of court contentions of parties as made by pleadings, especially where court instructed jury that pleadings were not evidence and were not to be so considered. *Langran v. Hodges*, 60 Ga. App. 567, 4 S.E.2d 489 (1939) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Court may state contentions made by petition though some are unsupported by evidence. — It is not improper, in charging jury, to state contentions made by allegations of the petition, or to give them by a narrative reading of petition, even though some of the contentions in either instance are unsupported by evidence. *Limbert v. Bishop*, 96 Ga. App. 652, 101 S.E.2d 148 (1957) (decided under former Code 1933, § 70-207, as it

read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Court sufficiently states contentions by referring jury to pleadings. — Where contentions of parties to suit are not complicated and can be easily ascertained by jury from inspection of pleadings, court sufficiently states contentions of parties by referring jury to pleadings. *Tharpe v. Cudahy Packing Co.*, 60 Ga. App. 449, 4 S.E.2d 49 (1939) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

It is error to instruct as to contention of plaintiff which has been stricken from petition and as to which no evidence was introduced. *Ellison v. Robinson*, 96 Ga. App. 882, 101 S.E.2d 902 (1958) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Absent request, charge need not cover matters merely collateral to main issue. — It is not error, in absence of timely written request, to fail to charge with reference to matters merely collateral or illustrative of main issues. *McCrackin v. McKinney*, 52 Ga. App. 519, 183 S.E. 831 (1936) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

In absence of timely written request, trial court's failure to charge upon incidental or collateral matters is not error. *Hilburn v. Hilburn*, 210 Ga. 497, 81 S.E.2d 1 (1954) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Mere failure to charge upon minor points to which court's attention was not called at the time, is not ground for new trial. *Wiley v. State*, 3 Ga. App. 120, 59 S.E. 438 (1907).

New trial not warranted by slight errors and inaccuracies of expression not calculated to mislead. *Weeks v. Reliance Fertilizer Co.*, 23 Ga. App. 128, 97 S.E. 664 (1918) (decided under former Penal Code 1910).

Significance to be attached to technical words when used in charge should be explained so that jury might comprehend full import of instructions given them. *City of Summerville v. Sellers*, 94 Ga. App. 152, 94 S.E.2d 69 (1956) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Jury Charge (Cont'd)

1. In General (Cont'd)

Court need not draw distinctions between technical terms whose general meanings are commonly understood. — Generally, in absence of proper written request so to do, it is not cause for a new trial that court, in charging jury, failed to define or draw distinctions between technical terms, where essential contentions and rules of law were given, and especially where general meaning and effect of such terms are commonly understood. *A.A.A. Hwy. Express, Inc. v. Hagler*, 72 Ga. App. 519, 34 S.E.2d 462 (1945) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

When charge embraces section of Code which contains technical words or expressions, the meaning of which is probably not understood by a person unlearned in the law, court should so define them as to convey to the jury a correct idea of their meaning, but it is unnecessary for the court, even upon request, to explain words and expressions which are of ordinary understanding and self-explanatory. *Floyd v. State*, 58 Ga. App. 867, 200 S.E. 207 (1938) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Failure to define defense relied upon. — Where, on trial of defendant charged with crime of murder, defense relied on was that homicide was result of accident or misfortune, and court correctly charges jury the law in relation thereto, it was not error for court to omit to define what would constitute accident or misfortune, in absence of request so to do. *Daniel v. State*, 171 Ga. 335, 155 S.E. 478 (1930) (decided under former Penal Code 1910).

Failure to define negligence or instruct as to proximate cause, absent request, is not error. *Southern Grocery Stores, Inc. v. Cain*, 50 Ga. App. 629, 179 S.E. 128 (1935) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Instructing that allegations of negligence are not supported by proof. — In absence of written request so to do, it is not necessary for court to instruct jury that any one or more allegations of negligence in petition

are not supported by proof and must not be considered by them. *Black & White Cab Co. v. Clark*, 67 Ga. App. 170, 19 S.E.2d 570 (1942) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Failure to charge on impeachment of witnesses, absent timely, written request, is not error. *Robinson v. State*, 114 Ga. 445, 40 S.E. 253 (1901); *Williamson v. State*, 143 Ga. 267, 84 S.E. 584 (1915) (decided under former Penal Code 1910); *Ware v. State*, 156 Ga. 749, 120 S.E. 528 (1923) (decided under former Penal Code 1910).

Failure to charge upon burden of proof does not require new trial, absent proper request. *Knapp Bros. Mfg. Co. v. Cook*, 171 Ga. 330, 155 S.E. 321 (1930) (decided under former Penal Code 1910).

Charging upon theory entirely dependent on defendant's statement. — Trial court is not required to give to the jury instructions upon any theory which depends for its existence solely upon defendant's statement, unless there be presented to court before beginning its charge an appropriate written request. *Marsh v. State*, 174 Ga. 83, 161 S.E. 817 (1931) (decided under former Penal Code 1910).

2. Recharge and Correction of Erroneous Charge

When jury requests recharge on any point, it is duty of court to do so. *Mathews v. Taylor*, 155 Ga. App. 2, 270 S.E.2d 247 (1980).

It is not necessary on recharge to cover subject in toto. *Creamer v. State*, 229 Ga. 704, 194 S.E.2d 73 (1972).

Judge is not required to restate entire charge when jury requests only partial recharge. *Andrews v. Lovell*, 145 Ga. App. 246, 243 S.E.2d 666 (1978).

Trial court has discretion to recharge in full or only upon points requested. *Williams v. State*, 151 Ga. App. 765, 261 S.E.2d 487 (1979).

Correction of erroneous charge. — Where incorrect charge has been called to jury's attention, and withdrawn from them, and a correct charge given, there is no merit in assignment of error complaining of incorrect charge. *Jones v. State*, 246 Ga. 109, 269 S.E.2d 6 (1980).

Where erroneous statement is made, it is not cured by correct statement in another

portion of charge unless jury's attention is called to correction by a retraction of erroneous statement or in some other like manner. *Johnson v. State*, 148 Ga. App. 702, 252 S.E.2d 205 (1979).

Failure to recharge held error. — The trial court erred by failing to recharge the jury on the presumption of innocence after the close of evidence and completion of arguments by counsel. *Blandburg v. State*, 209 Ga. App. 752, 434 S.E.2d 510 (1993).

3. Application

Cautionary instructions are not favored since in most instances they are productive of confusion and tend to restrict jury's untrammelled consideration of case. *Herman v. Boyer*, 154 Ga. App. 617, 269 S.E.2d 107 (1980).

Court must exercise care to avoid repetitious charges. — Care must be exercised to see that requested charges on same point will not subject court's charge to criticism that it is unduly repetitious; the fact that one party happened to request repetitious charges will not immunize charge from criticism. *Gates v. Southern Ry.*, 118 Ga. App. 201, 162 S.E.2d 893 (1968).

Giving of redundant requests is more likely error than exercise of restrictive discretion. — It is trial court's duty to see that charge is fair in any and all events. In carrying out that duty trial judges should bear in mind that error is more likely to exist in a too liberal giving of redundant requests than from exercising of restrictive discretion in charging them. *Gates v. Southern Ry.*, 118 Ga. App. 201, 162 S.E.2d 893 (1968).

Charge which is not applicable to facts should not be given. *Todd v. State*, 149 Ga. App. 574, 254 S.E.2d 894 (1979).

Where any evidence supports particular point, it is not error to charge law regarding such point. *Smith v. Lott*, 246 Ga. 366, 271 S.E.2d 463 (1980).

Affirmative defense need not be specifically charged if case as a whole is fairly presented. — If affirmative defense is raised by evidence, including defendants' own statements, trial court must present affirmative defense to jury as part of case in its charge, even absent a request; such affirmative defense, however, need not be specifically charged if case as a whole is fairly presented to jury. *Booker v. State*, 247 Ga.

74, 274 S.E.2d 334 (1981).

Charge on good character is only required when direct examination relates to general reputation, good or bad. Witnesses' opinion of appellant while sober did not establish their knowledge of his general reputation in the community, so as to place his character in issue. *Aldridge v. State*, 247 Ga. 142, 274 S.E.2d 525 (1981).

Charge on circumstantial evidence is demanded only when case is wholly dependent thereon. *Hudson v. State*, 127 Ga. App. 452, 193 S.E.2d 919 (1972).

Necessary charge where guilt of defendant depends solely on circumstantial evidence. — Where guilt of defendant is dependent solely on circumstantial evidence it is error to fail to charge that if proved facts are consistent with theory of innocence, defendant should be acquitted. *Thompson v. State*, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Instruction on general legal principles necessary to reach correct verdict. — Upon trial of criminal case, trial judge with or without request should instruct jury as to general principles of law which of necessity must be applied in reaching correct verdict on issues. *Tift v. State*, 133 Ga. App. 455, 211 S.E.2d 409 (1974).

Court need not instruct jury regarding "inherent pardoning power" during guilt-innocence phase of criminal trial. *Chafin v. State*, 246 Ga. 709, 273 S.E.2d 147 (1980).

Instructing jurors to vote consistently with individual judgment. — Where instructions were conditioned on each juror voting consistently with his individual judgment the fact that court omitted to charge that jurors should not abandon their convictions to be congenial did not constitute a deprivation of due process. *Byrd v. State*, 156 Ga. App. 522, 275 S.E.2d 108 (1980).

No need to assume a possible adverse construction. — A charge that is sufficiently clear to be understood by jurors of ordinary understanding is all that is required. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

Jury instruction did not denigrate the presumption of innocence by informing the petit jury that the grand jury had already determined that there was sufficient evidence to warrant a trial where judge specif-

Jury Charge (Cont'd)**3. Application (Cont'd)**

ically instructed the jury that "every person is presumed innocent until proved guilty." *Catchings v. State*, 256 Ga. 241, 347 S.E.2d 572 (1986).

Failure of charge to indicate which of several counts may support punitive damages. — It is error to deny the defendant's motion for new trial on the issue of punitive damages where plaintiff sued defendant on two counts, only one of which could support an award of punitive damages, but the trial court's charge did not so indicate and the Court of Appeals was, therefore, unable to determine the count upon which the jury hinged its award of punitive damages. *Marriott Corp. v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981).

4. Harmless Error

Mere verbal inaccuracy not reversible error. — Where it appears that word complained of represents merely a verbal inaccuracy, and charge as a whole lays down principle of law involved correctly, case will not be reversed on this ground. *Riviera Equip., Inc. v. Omega Equip. Corp.*, 155 Ga. App. 522, 271 S.E.2d 662 (1980).

Inaccuracies in charge which do not mislead or obscure meaning, do not require new trial. *Johnson v. State*, 148 Ga. App. 702, 252 S.E.2d 205 (1979).

Charging an entire statute when only part is applicable. — Even though not every phrase and portion of a Code section may be applicable, it is generally held that a new trial will not be granted if court gives in charge an entire statute or Code provision where part thereof is applicable even though part may be inapplicable under facts in evidence. *Bagley v. State*, 153 Ga. App. 777, 266 S.E.2d 804 (1980).

Incorrect charge on damages where verdict is for proper amount. — Though true measure of damages may not have been given in charge, no new trial is required if verdict does not exceed amount of damages which should have been found had charge been correct. *Southern Concrete Prods. Co. v. Martin*, 126 Ga. App. 534, 191 S.E.2d 314 (1972).

Erroneous charge on measure of damages as harmless error. — In cases where plaintiff seeks damages, and jury fails to return verdict in his favor, failure of court to charge on measure of damages is harmless error where there has been a jury verdict finding no liability. *Marshall v. Fulton Nat'l Bank*, 155 Ga. App. 51, 270 S.E.2d 281 (1980).

If jury returns verdict in favor of defendant as to liability, any error in instruction as to damages is harmless. *Garrison v. Rich's*, 154 Ga. App. 663, 269 S.E.2d 513 (1980).

Where only contested issues relate to liability of defendant and amount of damages inflicted, and verdict in favor of defendant is returned by jury, charge of court calculated to affect finding of jury on question of amount of damages only, and not calculated to affect finding upon question of defendant's liability or nonliability, will not require new trial whether erroneous or not. *Don Howard's Music Mart, Inc. v. Southern Bell Tel. & Tel. Co.*, 154 Ga. App. 648, 269 S.E.2d 506 (1980).

Defendant who neither requested charge nor objected to charge, has waived his rights and has no standing to complain on appeal. *Atlanta & W.P.R.R. v. Armstrong*, 138 Ga. App. 577, 227 S.E.2d 71 (1976).

Waiver of error by proceeding with closing argument. — Where court charges jury before closing arguments, counsel waives error by proceeding with closing argument. *Evans v. Moore*, 131 Ga. App. 169, 205 S.E.2d 507 (1974).

Failure to charge on certain issues not error absent written request or objection. — Trial court does not commit error by failing to charge on certain issues where there was no written request to charge on issues and no objection was made to charge as given. *Cochran v. Quinter, Inc.*, 156 Ga. App. 109, 274 S.E.2d 113 (1980).

Harmless omission from instructions of some element will not be reviewed. — Instructions fall under general rule that where no objection is made to mere omission to include some element not rising to the threshold of harmful error as a matter of law, enumerations of error will not be considered on appeal. *Byrd v. State*, 156 Ga. App. 522, 275 S.E.2d 108 (1980).

Failure to instruct jury to limit consideration of evidence to particular purpose. — It is well recognized that when evidence is

admitted for one purpose, it is not error for court to fail to instruct jury to limit its consideration to purpose for which it is admissible, in absence of request to so instruct. *Tankersley v. State*, 155 Ga. App. 917, 273 S.E.2d 862 (1980).

Failure to charge relative to good character of accused. — Proper instruction should be given in every case where accused puts his character in issue; but in absence of timely request, an omission to give specific charge on the subject will not require new trial. It is only in exceptional cases where court fails to charge relatively to good character of accused that new trial should be granted. *Spear v. State*, 230 Ga. 74, 195 S.E.2d 397 (1973).

Absent written request, failure to charge on question of character evidence is not error. *Smith v. State*, 153 Ga. App. 519, 265 S.E.2d 852 (1980).

Failure to charge on law of impeachment of witnesses not error where not requested. *Butts v. Davis*, 126 Ga. App. 311, 190 S.E.2d 595 (1972).

The charge on impeachment by proof of conviction was not reversible error even though the defendant had not placed his character in issue because of the overwhelming evidence of the defendant's guilt. *Peterson v. State*, 212 Ga. App. 147, 441 S.E.2d 481 (1994).

Charge on weight of opinion evidence is not required, absent timely written request. *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980).

Failure to charge on theory not relied on as defense. — Where theory of accident is not relied on as a defense, failure to charge on this theory, in absence of timely written request, is not error. *Morrow v. State*, 155 Ga. App. 574, 271 S.E.2d 707 (1980).

Failure to charge on voluntary manslaughter. — Where party failed to present written request to charge voluntary manslaughter at or before close of evidence, trial court's failure to so charge does not constitute reversible error. *Bouttry v. State*, 242 Ga. 60, 247 S.E.2d 859 (1978).

Charge on lesser crime than that included in indictment is discretionary. — Trial judge may, of his own volition and in his discretion, charge on a lesser crime of that included in indictment or accusation. However, his failure to do so, without written request by state

or accused, is not error. *Bouttry v. State*, 242 Ga. 60, 247 S.E.2d 859 (1978).

Special instructions regarding legal terms and technical words. — When party has requested no special instructions as to meaning of legal terms and technical words, this is not generally a ground for new trial. *Deshazier v. State*, 155 Ga. App. 526, 271 S.E.2d 664 (1980).

Charge, in divorce, awarding custody where record establishes marriage is irretrievably broken. — Where court's charge to jury in divorce case included award of custody and record supports factual determination that marriage was irretrievably broken, charge does not constitute substantial error as contemplated by this section. *Harper v. Harper*, 233 Ga. 253, 210 S.E.2d 773 (1974).

Charge must be prejudicial for reversal. — An erroneous charge touching a theory not in issue under the evidence, unless prejudicial and harmful as revealed by the record, does not require or demand a reversal. *Hall v. State*, 176 Ga. App. 498, 336 S.E.2d 604 (1985).

Trial court's failure to instruct jury without request on doctrine of comparative negligence did not constitute gross miscarriage of justice requiring a new trial. *King v. Communications, Inc.*, 166 Ga. App. 35, 303 S.E.2d 143 (1983).

5. New Trials for Refusal of Requested Charges

Writing necessary. — Request to charge, which is refused, must, to form basis of review, be in writing. *Foster v. Ramsey*, 102 Ga. App. 523, 116 S.E.2d 617 (1960) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

For refusal to justify new trial, request must be written and contain pertinent, legal charge. — To make refusal to give request in charge ground for new trial under this section, request must be a pertinent legal charge, and must be submitted in writing. *Savannah, F. & W. Ry. v. Horn*, 69 Ga. 759 (1882); *Savannah & S. Ry. v. Davis*, 28 Ga. App. 654, 112 S.E. 907 (1922) (decided under former Penal Code 1910).

Time of presentment must be alleged. — Assignment of error will not be considered where time of presenting request is not alleged. *Southern Ry. v. Williams*, 19 Ga.

Jury Charge (Cont'd)
5. New Trials for Refusal of Requested Charges (Cont'd)

App. 544, 91 S.E. 1001 (1917) (decided under former Penal Code 1910).

Must specify error. — If charge is not erroneous for any reason assigned, a new trial will not be granted. *Brown v. State*, 126 Ga. 105, 54 S.E. 914 (1906); *Jones v. State*, 126 Ga. 538, 55 S.E. 171 (1906); *Williams v. State*, 124 Ga. 782, 53 S.E. 98 (1906).

Motion must distinctly point out portion of charge challenged. — In order to be considered by appellate court, ground of motion for new trial assigning error upon charge of court must segregate from entire charge the part or parts thereof constituting alleged error. *Rentz v. Hagan*, 31 Ga. App. 729, 122 S.E. 247 (1924) (decided under former Penal Code 1910).

Where overwhelming evidence clearly establishes guilt of accused, erroneous charge will not work reversal. *Bradford v. State*, 69 Ga. App. 856, 26 S.E.2d 848 (1943) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Where guilt of accused is clearly established aliunde, error in admission of testimony or in charge of court fades into immateriality and does not demand reversal. *Miller v. State*, 69 Ga. App. 847, 26 S.E.2d 851 (1943) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

New trial not granted where verdict is not affected by refusal to charge as requested. *Georgia R.R. & Banking Co. v. Scott*, 37 Ga. 94 (1867); *Powers v. State*, 44 Ga. 209 (1871).

6. New Trial for Erroneous Charges

New trial permitted where instructions are not authorized by evidence. *Culberson v. Alabama Constr. Co.*, 127 Ga. 599, 56 S.E. 765, 9 L.R.A. (n.s.) 411, 9 Ann. Cas. 507 (1907).

New trial permitted where instructions erroneously state party's contentions. *Wilson v. Wilson*, 130 Ga. 677, 61 S.E. 530 (1908).

New trial warranted by omission to instruct as to form of verdict of acquittal. *Nalley v. State*, 11 Ga. App. 15, 74 S.E. 567

(1912) (decided under former Penal Code 1910).

Instructions applicable to matters wholly foreign to issue, calculated to mislead jury, demand new trial. *Yopp v. State*, 131 Ga. 593, 62 S.E. 1036 (1908).

Where issue is murder or manslaughter, omitting charge regarding latter is error requiring new trial. *Peterson v. State*, 146 Ga. 6, 90 S.E. 282 (1916) (decided under former Penal Code 1910).

Failure to charge on circumstantial evidence requires new trial where guilt rests entirely upon it. *Kincaid v. State*, 13 Ga. App. 683, 79 S.E. 770 (1913) (decided under former Penal Code 1910); *Harris v. State*, 18 Ga. App. 710, 90 S.E. 370 (1916) (decided under former Penal Code 1910).

In robbery prosecution, failure to charge regarding intent to steal is error requiring new trial. *Blackshear v. State*, 20 Ga. App. 87, 92 S.E. 554 (1912) (decided under former Penal Code 1910); *Sledge v. State*, 99 Ga. 684, 26 S.E. 756 (1896).

Failure to charge as to presumption of innocence is error requiring new trial. *Butts v. State*, 13 Ga. App. 274, 79 S.E. 87 (1913) (decided under former Penal Code 1910), later appeal, 14 Ga. App. 821, 82 S.E. 375 (1914) (decided under former Penal Code 1910).

New trial required where charge intimates judge's opinion upon evidence, in violation of § 17-8-55. *Morris v. State*, 6 Ga. App. 395, 65 S.E. 58 (1909).

Charge concerning confessions where there is evidence only of incriminating admissions is error. *Porter v. State*, 11 Ga. App. 246, 74 S.E. 1099 (1912) (decided under former Penal Code 1910).

Instructions intimating opinion as to probative value of certain evidence are erroneous. *Strickland v. State*, 6 Ga. App. 536, 65 S.E. 300 (1909); *Goolsby v. State*, 148 Ga. 474, 97 S.E. 73 (1918) (decided under former Penal Code 1910).

Objections to Charge or Failure to Charge

1. In General

Purpose of subsection (a) is to afford trial court an opportunity to correct errors in instructions without necessity of appeal. *Seagraves v. Abco Mfg. Co.*, 121 Ga. App. 224, 173 S.E.2d 416 (1970).

Obvious purpose of subsection (a) is to afford trial court opportunity to correct charge which has been given, and to consider grounds of objection at a time before jury has retired to consider its verdict and at a time when corrections can be made in charge if, upon such consideration, the court deems correction proper. *Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973).

One purpose of subsection (a) is to afford trial judge an opportunity to correct errors in instructions without necessity of appeal. *Fleet Transp. Co. v. Cooper*, 126 Ga. App. 360, 190 S.E.2d 629 (1972).

Subsection (a) seeks to eliminate sporting aspect of objection to charge. — It will not allow counsel in civil case to gamble by refusing to object to possibly erroneous charge or omission in charge, hoping for a favorable verdict, and then relying upon the error to obtain new trial if verdict is unfavorable. *Horton v. Ammons*, 125 Ga. App. 69, 186 S.E.2d 469 (1971), *aff'd sub nom. Smith v. Ammons*, 228 Ga. 855, 188 S.E.2d 866 (1972); *Christiansen v. Robertson*, 237 Ga. 711, 229 S.E.2d 472 (1976).

A party cannot ignore during trial that which he thinks to be error or injustice and take his chances on a favorable verdict and then complain later. *Simmons v. Edge*, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

Duty on counsel. — This section places the duty on counsel to exercise a high degree of clarity in objecting to charges. *Stone v. Burell*, 161 Ga. App. 369, 288 S.E.2d 636 (1982); *Turner v. Taylor*, 179 Ga. App. 574, 346 S.E.2d 920 (1986).

Failure to except to charge constitutes waiver. *Pierce v. Pierce*, 241 Ga. 96, 243 S.E.2d 46 (1978).

Where court in a criminal case inquires whether there is any objection to charge, and defendant's counsel raises none, appellant waives right to enumerate error by failing to respond to court's inquiry. *White v. State*, 243 Ga. 250, 253 S.E.2d 694 (1979).

Failure to except before verdict generally results in a waiver of any defects in the charge, the exception under subsection (c) of this section applying only when there has been a substantial error which was blatantly apparent and prejudicial, and which resulted in a gross miscarriage of justice. *Hunter v. Batton*, 160 Ga. App. 849, 288

S.E.2d 244 (1982); *Bryson v. Button Gwinnett Sav. Bank*, 205 Ga. App. 668, 423 S.E.2d 691 (1992).

Any rights available to criminal defendant under subsection (a) of this section are waived when defense counsel states he has no objections to charge. *Burgess v. State*, 162 Ga. App. 212, 290 S.E.2d 554 (1982).

Where defense counsel neither objects nor reserves the right to later object, the defendant waives the right to raise the issue on appeal. *Devoe v. State*, 249 Ga. 499, 292 S.E.2d 72 (1982).

Where the appellant fails to object to a particular charge at trial, he thereby waives appellate consideration of this issue. *DOT v. 2.734 Acres of Land*, 168 Ga. App. 541, 309 S.E.2d 816 (1983); *Tyler v. Bennett*, 215 Ga. App. 87, 449 S.E.2d 666 (1994).

In general, failure to object to the trial court's instruction to the jury before the jury returns its verdict constitutes a waiver of the right to raise the issue on appeal. *Henderson v. Glen Oak, Inc.*, 179 Ga. App. 380, 346 S.E.2d 842 (1986), *aff'd*, 256 Ga. 619, 351 S.E.2d 640 (1987).

Failure to object to a jury instruction that is allegedly confusing and prejudicial generally results in a waiver of any defects, except where the charge is substantially erroneous and harmful as a matter of law. *Hunter v. Hardnett*, 199 Ga. App. 443, 405 S.E.2d 286, *cert. denied*, 199 Ga. App. 906, 405 S.E.2d 286 (1991).

Failure to request charge or object to omission distinguished from failure to object to charge. — See *White v. State*, 243 Ga. 250, 253 S.E.2d 694 (1979).

In order to avoid waiver, if trial court inquires if there are objections to charge, counsel must state objections or reserve right to object on motion for new trial or on appeal. *Jackson v. State*, 246 Ga. 459, 271 S.E.2d 855 (1980); *Lewis v. State*, 215 Ga. App. 161, 450 S.E.2d 448 (1994).

Reservation of right to object in motion for new trial prevents waiver. — Where trial court in a criminal case inquires whether there is objection and defendant's counsel states that he reserves right to object in motion for new trial or appeal, there is no waiver. *White v. State*, 243 Ga. 250, 253 S.E.2d 694 (1979).

Waiver by acceptance of charge. — Invoking the right to request certain instructions

Objections to Charge or Failure to Charge (Cont'd)

1. In General (Cont'd)

in writing, as authorized in subsection (b), does not avoid the waiver which occurs when, after the whole charge is given, express acceptance of it is stated. *Roura v. State*, 214 Ga. App. 43, 447 S.E.2d 52 (1994).

Absent objection, erroneous instructions not reviewable unless constituting substantial error as a matter of law. — Where no objection is made before verdict, error claimed on appeal will not be reviewed unless it is deemed to be substantial and error as a matter of law under subsection (c). *Bailey v. Todd*, 126 Ga. App. 731, 191 S.E.2d 547 (1972), cert. denied, 409 U.S. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973).

In order to obtain review, objection to any charge or failure to charge should be made prior to return of jury's verdict, with the exception that where substantial error is made in the charge, it will be reviewed by appellate courts without such objection. *Dixon v. State*, 224 Ga. 636, 163 S.E.2d 737 (1968).

Where party did not complain of instructions given jury before jury returned its verdict, and charges were not substantially in error so as to be harmful to him as a matter of law, these alleged errors present no question for review. *Kirkman v. Miller*, 116 Ga. App. 78, 156 S.E.2d 558 (1967).

Where record discloses that no objection was made at trial to any part of court's charge, there must have been substantial error in the charge which was harmful as a matter of law in order for appellate court to consider and review it. *Parks v. State*, 230 Ga. 157, 195 S.E.2d 911 (1973).

Complaint concerning a charge to jury is barred where no objection is made at trial, unless appellate court should find that the charge was harmful as a matter of law, i.e., that it was blatantly prejudicial or resulted in a gross miscarriage of justice. *Lavender v. State*, 234 Ga. 608, 216 S.E.2d 855 (1975).

Party in civil case cannot complain of giving or failure to give instruction to jury, unless he objects thereto before jury returns its verdict, unless it appears that the error contended is blatantly apparent and prejudicial. *Mathews v. Penley*, 242 Ga. 192, 249 S.E.2d 552 (1978), cert. denied, 440 U.S. 924, 99 S. Ct. 1255, 59 L. Ed. 2d 478 (1979).

Where no exception was made to charge, or as to any failure of court to charge explanation thereof at any time before verdict, as is required by subsection (a), unless error appears that is harmful as a matter of law, Court of Appeals is not authorized to consider enumeration. *Holcomb v. Kirby*, 117 Ga. App. 266, 160 S.E.2d 250 (1968).

Errors alleged to have been in charge but to which there was no exception as provided in subsections (a) and (b) will not generally be held harmful as a matter of law, and will not be considered unless it appears that gross injustice is about to result or has resulted, directly attributable to alleged errors. *Barlow v. Rushin*, 114 Ga. App. 304, 151 S.E.2d 199 (1966); *Murray v. Richardson*, 134 Ga. App. 676, 215 S.E.2d 715 (1975).

Where appellant made no objection to trial court's charge, even when asked specifically by court if he had any question or additions to the charge, unless there is substantial error which is harmful as a matter of law, such acquiescence in given instruction is reason enough to find appellant's enumeration of error regarding the charge to be without merit. *Johnson v. State*, 156 Ga. App. 411, 274 S.E.2d 778 (1980), cert. denied, 451 U.S. 989, 101 S. Ct. 2327, 68 L. Ed. 2d 848 (1981).

Unless alleged error in portion of court's charge is blatantly apparent and prejudicial, appellant may not complain of the charge for the first time on appeal. *McDaniel v. Gysel*, 155 Ga. App. 111, 270 S.E.2d 469 (1980).

Where appellant did not object to charge of trial court on measure of damages as required by this section and court did not commit substantial error in charge which was harmful as a matter of law, no question for review is presented by enumerations of error on those grounds. *Wright v. Thompson*, 236 Ga. 655, 225 S.E.2d 226 (1976).

Review of charge enumerated as error is restricted to ground of objection stated on trial. *Palmer v. Stevens*, 115 Ga. App. 398, 154 S.E.2d 803 (1967); *City of Macon v. Smith*, 117 Ga. App. 363, 160 S.E.2d 622 (1968); *Goodyear Tire & Rubber Co. v. Johnson*, 120 Ga. App. 395, 170 S.E.2d 869 (1969); *Fidelity-Phenix Ins. Co. v. Mauldin*, 123 Ga. App. 108, 179 S.E.2d 525 (1970).

Alleged error in damages instruction waived by failure to object. — Failure to

object that the trial court erred by charging the jury on damages pursuant to §§ 51-12-5 and 51-12-6 before the jury returned its verdict in an action for wrongful dispossession, trespass, conversion, and theft constituted a waiver of the right to raise the issue on appeal, and there was no substantial error which would require review under the exception set forth in subsection (c). *Sanders v. Hughes*, 183 Ga. App. 601, 359 S.E.2d 396, cert. denied, 183 Ga. App. 907, 359 S.E.2d 396 (1987).

No waiver in absence of request for objections. — Where counsel is never asked if he has any objection to a charge as given, his right to relief under this section is not waived. *Brady v. State*, 169 Ga. App. 316, 312 S.E.2d 632 (1983).

Objections waived when counsel states he has no exceptions. — Defense counsel waives objections when he states, in response to the trial court's query, that he has no exceptions to a charge as given. *Kirk v. State*, 168 Ga. App. 226, 308 S.E.2d 592 (1983), *aff'd*, 252 Ga. 133, 311 S.E.2d 821 (1984); *Mantooth v. State*, 197 Ga. App. 797, 399 S.E.2d 505 (1990).

Where at the close of the trial court's charge, defendant's trial counsel states he has no exceptions to the charge, this constitutes a waiver. *Hunt v. State*, 157 Ga. App. 407, 278 S.E.2d 61 (1981); *Bryant v. State*, 256 Ga. 273, 347 S.E.2d 567 (1986).

Grounds enumerated as error but not raised during trial may not be raised for the first time on appeal. *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Variance between objection and error enumerated on appeal. — Where the objection made at trial dealt only with the time when the decision was made known to counsel as to what the court would charge, that objection was not the error enumerated on appeal, where the enumerated error related to the "substance" of the charges not being made known to counsel. *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Form of objection unimportant. — It is not important in what format an allegation is cast so long as it is clear to court what the specific error alleged is, so that it may have opportunity to correct it. *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Failure to object to charge at time of trial precludes alleging error on that ground.

Foster v. Harmon, 145 Ga. App. 413, 243 S.E.2d 659 (1978).

Where at trial, plaintiff fails to make objection on ground enumerated as error, such enumeration presents nothing for court's consideration. *Moon v. Combs*, 116 Ga. App. 144, 156 S.E.2d 543 (1967).

Where no objections were made to the failure to give requested charges, they cannot be considered on appeal. *Nolen v. Murray Indus., Inc.*, 165 Ga. App. 785, 302 S.E.2d 689 (1983).

Where appellant did not raise an objection to the charge on avoidance in the court below prior to the return of the verdict, it cannot be raised for the first time on appeal. *Lloyd v. Stone Mt. Mem. Ass'n*, 165 Ga. App. 679, 302 S.E.2d 602 (1983).

Failure to object to any particular charge at trial waives appellate review of the charge. *Kellett v. Department of Transp.*, 174 Ga. App. 214, 329 S.E.2d 514 (1985).

Where plaintiff challenges the trial court's "failure" to "caution" the jury about improper language contained in an order, but no cautionary instructions were requested at the time the evidence was admitted, no exceptions were taken to the court's charge, and no requests for instructions on this issue were submitted by plaintiff, in view of plaintiff's failure to except to the charge or present to the court the charge requested, this enumeration is without merit. *Eiberger v. West*, 165 Ga. App. 559, 301 S.E.2d 914 (1983).

Where the appellant enumerates as error the failure of the trial court to give requested charges on a defense to a criminal count, but it appears that, although given the opportunity to do so in the trial court, the appellant neither raised any objection to the charge, nor reserved the right to except to the trial court's charge at a later time, he waives his right to assert error. *Bivins v. State*, 166 Ga. App. 580, 305 S.E.2d 29 (1983).

Where a party fails to object to a charge at trial, his contention thereto as to trial error is without merit. *Hudson Properties, Inc. v. Citizens & S. Nat'l Bank*, 168 Ga. App. 331, 308 S.E.2d 708 (1983).

There is no difference between cases where counsel acquiesced in the giving of a charge and cases where counsel acquiesced in the failure to give a particular charge. If counsel expressly acquiesced in a jury

Objections to Charge or Failure to Charge (Cont'd)

1. In General (Cont'd)

charge as given, any objection to either the inclusion or the omission of a particular charge was waived. *Bell v. Samaritano*, 196 Ga. App. 612, 396 S.E.2d 520 (1990), *aff'd*, 260 Ga. 768, 400 S.E.2d 13 (1991).

In a personal injury action, where there was no objection to a charge respecting proximate cause on any occasion, any error was induced by the plaintiff, and precludes her from maintaining the issue on appeal. *Moore v. Sinclair*, 196 Ga. App. 667, 396 S.E.2d 557 (1990).

No review absent proper objection. — Absent proper objection, Georgia appeals court will not review claim of error. *Pittman v. Peebles*, 148 Ga. App. 64, 251 S.E.2d 30 (1978).

When party fails to object to jury charge at time of trial he is precluded from alleging error on appeal as to that ground. *City Express Serv., Inc. v. Rich's, Inc.*, 148 Ga. App. 123, 250 S.E.2d 867 (1978).

Where requirements of section have not been met, alleged errors present no question for review. *Vogt v. Rice*, 114 Ga. App. 251, 150 S.E.2d 691 (1966).

Where counsel for appellant fails to comply with subsections (a) and (b) by not filing any written requests to charge, and in failing to give judge opportunity to correct erroneous instructions he may have given in charge, enumerations of error based on certain erroneous instructions will not be considered. *Georgia Power Co. v. Slappey*, 121 Ga. App. 534, 174 S.E.2d 361 (1970).

Objections to charge of court are not required in criminal cases. *Key v. State*, 147 Ga. App. 800, 250 S.E.2d 527 (1978).

Subsection (a) of this section does not apply to criminal cases. *Griffin v. State*, 133 Ga. App. 508, 211 S.E.2d 382 (1974).

Appellant in criminal case may appeal and enumerate error on an erroneous charge or on erroneous failure to charge without first raising the issue in trial court. *Gaither v. State*, 234 Ga. 465, 216 S.E.2d 324 (1975).

There is no requirement to enter objection to erroneous criminal charge given unless the trial court specifically requires the defendant to enter objections prior to the return of the verdict or reserve the right to

make such an objection. *Gaines v. State*, 177 Ga. App. 795, 341 S.E.2d 252 (1986).

Where an omission to charge is involved, there is a requirement to request a charge and/or object to its omission or suffer a waiver. *Gaines v. State*, 177 Ga. App. 795, 341 S.E.2d 252 (1986).

Defendant's objections to charge on attorney fees are waived by failure to make them at trial. *Nationwide Mut. Fire Ins. Co. v. Rhee*, 160 Ga. App. 468, 287 S.E.2d 257 (1981).

Trial court's failure to charge jury that they were not required to accept expert testimony offered by plaintiffs to establish attorney fees cannot be asserted as error in absence of timely written request for such charge. *Nationwide Mut. Fire Ins. Co. v. Rhee*, 160 Ga. App. 468, 287 S.E.2d 257 (1981).

Judge's failure to inquire as to objection. — Waiver of rights under this section did not occur where the judge failed to inquire as to objection. *Collins v. State*, 176 Ga. App. 634, 337 S.E.2d 415 (1985).

Failure to charge one final time. — Court's failure to charge one final time was not harmful and erroneous as a matter of law where several times during the trial court had charged substance of section. *Yeargin v. State*, 164 Ga. App. 835, 298 S.E.2d 606 (1982).

Failure to answer jury question. — A trial court's failure to answer or respond to a deliberating jury's question on a jury charge cannot be challenged in a motion for a judgment notwithstanding the verdict where no objection to the court's failure to instruct the jury was made prior to the acceptance of the verdict. *Parks v. Consolidated Freightways*, 187 Ga. App. 576, 370 S.E.2d 827 (1988).

2. Time for Objection

Duty to make timely objection. — This section does not relieve the criminal defendant of the obligation to make timely objection throughout the trial. This obligation is essential to the court's trying the case with as few errors as possible. *Foshee v. State*, 256 Ga. 555, 350 S.E.2d 416 (1986).

In a criminal case, defense counsel is not required to object immediately to the charge but may reserve the right to object on ap-

peal. *Sweat v. State*, 173 Ga. App. 441, 326 S.E.2d 809 (1985).

Objection made after the charge and in response to the trial court's inquiry concerning exceptions to its instructions is timely, whether or not that objection was raised during a previous charge conference. *Brown v. Sims*, 174 Ga. App. 243, 329 S.E.2d 523, cert. vacated, 254 Ga. 538, 333 S.E.2d 371 (1985).

Objection to be made before jury returns verdict. — Objections to trial judge's charge should be made before jury returns its verdict. *Gaines v. City of Gainesville*, 115 Ga. App. 220, 154 S.E.2d 280 (1967).

This statute prohibits a party from complaining of the giving or failing to give jury instructions unless it objects before the jury returns its verdict, except where there has been a substantial error in the charge which was harmful as a matter of law. *DOT v. Old Nat'l Inn, Inc.*, 179 Ga. App. 158, 345 S.E.2d 853, cert. vacated, 256 Ga. 315, 349 S.E.2d 748 (1986).

Section requires making of objections before jury returns its verdict, not before it retires to deliberate. *Bruce v. Calhoun First Nat'l Bank*, 134 Ga. App. 790, 216 S.E.2d 622 (1975).

Where objections to court's instructions are not made before jury returns verdict as required by this section, they are not considered. *Callaway v. Atlantic & Pac. Tea Co.*, 115 Ga. App. 769, 156 S.E.2d 174 (1967).

Where record does not reflect that defendant made any objection or exception to instructions given jury before returning its verdict as required by this section, nothing is presented for consideration by pertinent enumerations of error. *John L. Hutcheson Mem. Tri-County Hosp. v. Oliver*, 120 Ga. App. 547, 171 S.E.2d 649 (1969).

Exceptions to charge not made at time required by subsection (a) raise no question for determination on appeal. *Stubbs v. Daughtry*, 115 Ga. App. 22, 153 S.E.2d 633 (1967).

Failure to except before verdict generally results in waiver of any defects in charge. *Bryant v. Housing Auth.*, 121 Ga. App. 32, 172 S.E.2d 439 (1970).

A party may not complain of the giving or failure to give an instruction to the jury unless he objects to the instruction before the jury returns its verdict, stating distinctly

his objection and the grounds of his objection; failure to do so generally results in a waiver of any defects in the charge. *Little v. Little*, 173 Ga. App. 116, 325 S.E.2d 624 (1984).

3. Form and Content of Objection

Formalistic, technically perfect objection not required. — The only requirement is that grounds of objection be stated distinctly enough for a reasonable trial judge to understand its nature, enabling him to rule intelligently on the specific point. *Horton v. Ammons*, 125 Ga. App. 69, 186 S.E.2d 469 (1971), aff'd sub nom. *Smith v. Ammons*, 228 Ga. 855, 188 S.E.2d 866 (1972); *Christiansen v. Robertson*, 237 Ga. 711, 229 S.E.2d 472 (1976); *DOT v. Old Nat'l Inn, Inc.*, 179 Ga. App. 158, 345 S.E.2d 853, cert. vacated, 256 Ga. 315, 349 S.E.2d 748 (1986).

Objections should be sufficiently specific for trial court to identify precise basis. *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

An objection must be sufficiently specific in order that the alleged error can be reasonably understood and addressed by the trial court. *McGaha v. Kwon*, 161 Ga. App. 216, 288 S.E.2d 289 (1982); *Smaha v. Moore*, 193 Ga. App. 23, 387 S.E.2d 13 (1989).

Where, at the conclusion of the charge conference, plaintiff simply restated her requested charge and asserted "[w]e ask that that should have been given, and we think it's proper...We think that the charge was an accurate statement of the law and that it applies in this case," the objection failed to meet the requirements of this section. *James v. Tyler*, 215 Ga. App. 479, 451 S.E.2d 506 (1994).

Rationale underlying requirement that objection be sufficiently specific, is to ensure that trial judge is afforded opportunity to correct any error in instructions prior to verdict so that necessity of appeal will be obviated. *Hilliard v. Canton Whsle. Co.*, 151 Ga. App. 184, 259 S.E.2d 182 (1979).

Objection must be written, state grounds, and be made before jury returns verdict. — Appellant must make proper objection to charge as given or to a request refused and state the grounds therefor before jury returns its verdict. *Wright v. Dilbeck*, 122 Ga. App. 214, 176 S.E.2d 715 (1970).

Objections to Charge or Failure to Charge (Cont'd)

3. Form and Content of Objection (Cont'd)

Objection must fully apprise court of error committed and correction needed to cure error. *Wright v. Dilbeck*, 122 Ga. App. 214, 176 S.E.2d 715 (1970).

Counsel is not required to suggest correct instruction in place of that objected to; statutory requirement is only that he shall state distinctly the matter to which he objects and the ground of his objection. *A-1 Bonding Serv., Inc. v. Hunter*, 125 Ga. App. 173, 186 S.E.2d 566 (1971), *aff'd*, 229 Ga. 104, 189 S.E.2d 392 (1972).

Section requires statement of ground of objection or exception. *Bailey v. Todd*, 126 Ga. App. 731, 191 S.E.2d 547 (1972), *cert. denied*, 409 S.E. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973); *Christiansen v. Robertson*, 139 Ga. App. 423, 228 S.E.2d 350, *rev'd* on other grounds, 140 Ga. App. 725, 231 S.E.2d 828 (1976).

Appellant must make proper objection to a charge as given or to a request refused and state grounds therefor. *Fidelity-Phenix Ins. Co. v. Mauldin*, 123 Ga. App. 108, 179 S.E.2d 525 (1970).

Objection to charge without stating grounds is insufficient to raise reviewable question in appeals court. *Christiansen v. Robertson*, 140 Ga. App. 725, 231 S.E.2d 828 (1976).

Objection must distinctly point out portion of charge challenged. — To be reviewable, objection to a charge must be unmistakable in its purport in directing attention of trial court to the claimed error and must distinctly point out portion of the charge challenged. *Black v. Aultman*, 120 Ga. App. 826, 172 S.E.2d 336 (1969); *Wright v. Dilbeck*, 122 Ga. App. 214, 176 S.E.2d 715 (1970).

Failure to specify portion of charge objected to. — When the trial court asked for objections to the jury charge, defendant stated some objections but did not mention the portion of the charge to which he objected on appeal, and did not reserve the right to object in a motion for new trial or an appeal, thereby waiving his right to assert error on appeal, the Court of Appeals reviewed the charge but found that it was not

harmful as a matter of law. *Lancaster v. State*, 190 Ga. App. 505, 379 S.E.2d 786 (1989).

Objection which identifies charge objected to but states no ground. — Where objections to charge, while sufficient to identify charge objected to, state no grounds of objections, they are insufficient to meet the requirements of this section. *Noble v. Kerr*, 123 Ga. App. 319, 180 S.E.2d 601 (1971).

Cryptic statement, "objection," is entirely too vague and indefinite for decision by the trial court or by the appellate court. *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Enumeration of error or brief should refer to part of record where objection appears. — Enumeration of error or brief of counsel should refer to that part of record where objection to charge as given appears, and simple statement that counsel objects to refusal to give request is insufficient objection to charge. *Johnson v. Myers*, 118 Ga. App. 773, 165 S.E.2d 739 (1968).

This section is violated where appellant's enumerations of error complain of the trial court's instructions to the jury and the purported charges are set out but there is no reference to their location in the transcript and no mention of any objection made or where it might be found. *Sanders v. Bowen*, 196 Ga. App. 644, 396 S.E.2d 908 (1990).

Items which grounds of error must clearly indicate. — Grounds of error urged must be stated with sufficient particularity to leave no doubt as to portion of charge challenged or as to what the specific ground of challenge is and the correction needed to cure the error. *Black v. Aultman*, 120 Ga. App. 826, 172 S.E.2d 336 (1969); *Stone v. Burell*, 161 Ga. App. 369, 288 S.E.2d 636 (1982).

Record must indicate objection was made prior to verdict and what objection was. — No questions are raised on appeal as to portions of charge where there is no reference in enumerations or in brief as to portions of record indicating that objections were made prior to verdict and what the objections may have been. *Yale & Towne, Inc. v. Sharpe*, 118 Ga. App. 480, 164 S.E.2d 318 (1968).

Appellant who enumerated as error the court's charges to the jury on comparative negligence and backing but who submitted the record on appeal containing only portions of the trial transcript and did not show

that objections were made to the charges did not merit a new trial. *Beckford v. Riley*, 206 Ga. App. 130, 424 S.E.2d 381 (1992).

Preservation of issue as to correctness of charge by oral objection. — While subsection (b) requires that requests for charge be submitted in writing, counsel in criminal case may preserve issue as to correctness of given charge by oral objection, for present law exempts defendant in criminal case from strict requirements imposed on litigants in civil cases to preserve an issue on giving of or failure to give instructions to jury. *Reed v. State*, 130 Ga. App. 659, 204 S.E.2d 335 (1974).

4. Application

Informal objection is sufficient where issue is important and trial judge understands objection. — Where issue is important and trial court undoubtedly understood what counsel was objecting to and why he was objecting, objection without formality is sufficient for consideration on appeal. *Morey v. Dixie Lime & Stone Co.*, 134 Ga. App. 928, 216 S.E.2d 657 (1975).

General objection merely stating charge is irrelevant. — General objection to trial judge that charge is irrelevant, without clearly specifying what is contended should have been charged, is insufficient to entitle objection to review. *City of Atlanta v. Layton*, 123 Ga. App. 432, 181 S.E.2d 313 (1971).

Mere general exception to charge or portion of it is insufficient to raise issue. *Bailey v. Todd*, 126 Ga. App. 731, 191 S.E.2d 547 (1972), cert. denied, 409 U.S. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973).

General objection to court's charge which points out no specific defect is insufficient; objection must be sufficiently specific to bring into focus the precise nature of alleged error so that it can be reasonably understood by trial court. *Royal Frozen Foods Co. v. Garrett*, 119 Ga. App. 424, 167 S.E.2d 400, rev'd on other grounds sub nom. *Garrett v. Royal Bros. Co.*, 225 Ga. 533, 170 S.E.2d 294 (1969).

Mere objection to giving of numbered request to charge, without stating grounds, does not satisfy section. *Fidelity-Phenix Ins. Co. v. Mauldin*, 123 Ga. App. 108, 179 S.E.2d 525 (1970); *Moore v. Carrington*, 155 Ga. App. 12, 270 S.E.2d 222 (1980).

Statement that litigant objects to certain

requests to charge made by opposite party, designating them by number only and stating no grounds for their disallowance, is not a compliance with requirement of subsection (a). *MacDougald Constr. Co. v. State Hwy. Dep't*, 125 Ga. App. 591, 188 S.E.2d 405 (1972).

Mere exception to failure to give numbered request to charge is insufficient as objection. *Black v. Aultman*, 120 Ga. App. 826, 172 S.E.2d 336 (1969); *Reeves v. Morgan*, 121 Ga. App. 481, 174 S.E.2d 460, rev'd on other grounds, 226 Ga. 697, 177 S.E.2d 68 (1970); *Wright v. Dilbeck*, 122 Ga. App. 214, 176 S.E.2d 715 (1970); *Louisville & N.R.R. v. Moreland*, 122 Ga. App. 850, 178 S.E.2d 904 (1970).

Treatment of exception as abandoned. — If exception made is not argued or insisted upon, it will be treated as abandoned. *Fidelity-Phenix Ins. Co. v. Mauldin*, 123 Ga. App. 108, 179 S.E.2d 525 (1970).

Asserted error on recharge is not for consideration and review absent objection before verdict. *Lanier v. Zayre of Ga., Inc.*, 125 Ga. App. 739, 188 S.E.2d 885 (1972).

Grounds cannot be enlarged on appeal to include grounds not urged before trial court. *Bailey v. Todd*, 126 Ga. App. 731, 191 S.E.2d 547 (1972), cert. denied, 409 U.S. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973).

Instruction which confused burden of coming forward and burden of proof. — Where trial judge charged jury that once propounder established prima facie case, then burden of coming forward with evidence to meet prima facie case is on caveator instead of charging the jury that burden of proof shifted to caveator, error in charge was not so prejudicial to propounder as to be reviewable on appeal absent objection at trial. *Johnson v. Dodgen*, 244 Ga. 422, 260 S.E.2d 332 (1979).

Deficiencies in transcript, in and of themselves do not justify reversal. — In a civil case where appellant has not shown that exceptions were made to charge, and did not seek hearing in trial court to attempt to show that exceptions to charge were timely made, and all that is missing in transcript is charge of court and exceptions made thereto, judgment will not be reversed because of deficiencies in transcript. *Albea v. Jackson*, 236 Ga. 690, 225 S.E.2d 46 (1976).

Assertions of error concerning the damages portion of the court's charge which

Objections to Charge or Failure to Charge (Cont'd)

4. Application (Cont'd)

were not raised in the trial court cannot be considered on appeal. *Thomason v. Harper*, 162 Ga. App. 441, 289 S.E.2d 773 (1982).

Failure to charge on retraction waived where charge not submitted. — Where, in a defamation action, defendants failed to submit to the trial court a charge based on § 51-5-11(c), they may not question on appeal the trial court's failure to give a charge on retraction, in view of subsection (b) of this section. *Williamson v. Lucas*, 166 Ga. App. 403, 304 S.E.2d 412 (1983), *aff'd*, 171 Ga. App. 695, 320 S.E.2d 800 (1984).

Where request on burden of proof vague.

— Where defendants never submitted a charge any more than vaguely outlining the burden of "clear and convincing" proof as to actual malice in an action for defamation of a public official, they cannot complain on appeal of the trial court's failure to give a clearer charge on that issue, in view of subsection (b) of this section. *Williamson v. Lucas*, 166 Ga. App. 403, 304 S.E.2d 412 (1983), *aff'd*, 171 Ga. App. 695, 320 S.E.2d 800 (1984).

Failure to object to charge in death penalty case not waiver. — The failure to object to a sentencing phase jury charge in a death penalty case where the jury was not informed that a life sentence could be recommended in spite of the presence of aggravating circumstances did not preclude review of that charge in a habeas corpus proceeding. *Stynchcombe v. Floyd*, 252 Ga. 113, 311 S.E.2d 828 (1984).

No waiver where trial court incorporated by reference objections. — Where appellee made the threshold assertion that plaintiffs waived objection made during the charge conference by not excepting to the charge after the jury was instructed, and where the nature of the objection raised here was not entirely the same as that made at the charge conference, the Court of Appeals addressed the merits, because the trial court stated after the jury charge that he incorporated by reference the conference objections and rulings, and after recharge again took blanket note of the previous "exceptions;" by its "incorporation" statement, made unsolicited at a time when an invitation to state

exceptions should have been extended, the court implied that it assumed the parties would raise exceptions similar to the objections voiced during charge conference, and further that it rejected them; thus the court created an awkward situation for which the party was not penalized. *Clemons v. Atlanta Neurological Inst.*, 192 Ga. App. 399, 384 S.E.2d 881 (1989).

Failure to object to charge on theory of accident. — The Court of Appeals was unable to reach the merits of the contention that the trial court erred in giving defendant's request to charge on the theory of accident where plaintiff lodged no objection whatsoever in this regard before the trial court. *Turner v. Taylor*, 179 Ga. App. 574, 346 S.E.2d 920 (1986).

Failure to object to absence of requested charges. — Where at the conclusion of the jury charge and following the court's inquiry whether or not there were objections to the charge, appellant made no objection to any absence of two of her requested charges, she may not complain on appeal about their exclusion. *Turner v. Taylor*, 179 Ga. App. 574, 346 S.E.2d 920 (1986).

Failure to object to charge at charge conference does not preclude a party from objecting to the charge when it is given. *Koppar Corp. v. Robertson*, 186 Ga. App. 856, 368 S.E.2d 807 (1988).

Failure to participate in proposed charge conference. — This section does not apply to defendant where the record demonstrates that defendant's counsel refused to participate in a proposed charge conference and announced that he had no objection to the proposed charges. *Teague v. York*, 203 Ga. App. 24, 416 S.E.2d 356 (1992).

Substantial Error as a Matter of Law

1. In General

Subsection (c) strictly construed. — While notwithstanding the provisions of subsections (a) and (b), the court shall consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, whether objection was made at trial or not, this provision must be construed strictly or it will result in an emasculation of the preceding provisions in subsections (a) and (b).

Nathan v. Duncan, 113 Ga. App. 630, 149 S.E.2d 383 (1966).

Subsection (c) must be construed strictly or it will result in emasculation of preceding provisions in subsections (a) and (b). *Widener v. Mitchell*, 137 Ga. App. 730, 224 S.E.2d 868 (1976).

Instances falling within subsection (c) are rare. — Instances when the charge will be found ground for reversal under subsection (c), where counsel has not taken exception, are likely to be very, very rare. *Central of Ga. Ry. v. Luther*, 128 Ga. App. 178, 196 S.E.2d 149 (1973).

Court should hesitate to exercise right under this subsection unless it appears that a gross injustice is about to result or has resulted, directly attributable to the alleged error. Instances where the charge will be found ground for reversal are likely to be very, very rare. *Seabolt v. Cheeseborough*, 127 Ga. App. 254, 193 S.E.2d 238 (1972).

Appellant must have been deprived of fair trial. — An allegedly erroneous instruction must raise a question as to whether the appellant has been deprived of a fair trial as a result of the challenged instruction in order to fall within subsection (c). *Nelson v. Miller*, 169 Ga. App. 403, 312 S.E.2d 867 (1984); *Henderson v. Glen Oak, Inc.*, 179 Ga. App. 380, 346 S.E.2d 842 (1986), *aff'd*, 256 Ga. 619, 351 S.E.2d 640 (1987).

Defendant not deprived of fair trial by erroneous jury charge. *Swanson v. DOT*, 200 Ga. App. 577, 409 S.E.2d 74, *cert. denied*, 200 Ga. App. 897, 409 S.E.2d 74 (1991).

To constitute harmful error within the meaning of subsection (c) of this section, an erroneous charge or failure to charge must result in a gross injustice, such as to raise a question as to whether the appellant has been deprived of a fair trial. *Hamrick v. Wood*, 175 Ga. App. 67, 332 S.E.2d 367 (1985); *Wisenbaker v. Warren*, 196 Ga. App. 551, 396 S.E.2d 528 (1990); *Greenhill v. State*, 199 Ga. App. 218, 404 S.E.2d 577, *cert. denied*, 199 Ga. App. 906, 404 S.E.2d 557 (1991).

2. Application

Subsection (c) refers only to failure to make objection to charge, and not to those instances where giving of instruction, or failure to give instruction, is induced by counsel for complaining party during course

of trial, or specifically acquiesced in by counsel. *Irvin v. Oliver*, 223 Ga. 193, 154 S.E.2d 217 (1967).

Generally, if counsel fails to see error, it is not to be considered harmful. — Generally, if counsel, who are skilled and trained in law and who have prepared and tried the case, fail to see error and enter exception as provided in subsections (a) and (b), it is not to be regarded as harmful. *Central of Ga. Ry. v. Luther*, 128 Ga. App. 178, 196 S.E.2d 149 (1973).

Failure to enumerate error. — Even if the failure to give a charge on a defendant's burden to prove affirmative defenses, either generally or specifically directed at the affirmative defense of comparative negligence, amounted to a substantial error harmful as a matter of law under subsection (c), since it was not enumerated as error on appeal, it could not be considered by the appellate court. *Heath v. L.E. Schwartz & Son*, 199 Ga. App. 452, 405 S.E.2d 290, *cert. denied*, 199 Ga. App. 906, 405 S.E.2d 290 (1991).

Types of erroneous charges that justify reversal although no objection made. — Reversals by reason of erroneous jury charges to which no exceptions are taken are generally those in which: (1) there was an erroneous presentation of the sole issue for decision; or (2) of a kind which would have been likely to unduly influence the jury; or (3) blatantly prejudicial to extent of raising question as to whether losing party has thus been deprived of fair trial; or (4) gross injustice resulted therefrom. *Mack v. Barnes*, 128 Ga. App. 328, 196 S.E.2d 684 (1973).

Test under subsection (c) is whether arguments urged against specific instructions show probable error and, if so, whether it is of a kind which would have been likely to influence the jury either to find against defendant or to return a larger verdict than it might otherwise have done. *Yale & Towne, Inc. v. Sharpe*, 118 Ga. App. 480, 164 S.E.2d 318 (1968).

Interpretation of words "substantial error ... harmful as a matter of law" should be construed as meaning blatantly apparent and prejudicial to extent that it raises question of whether losing party has, to some extent at least, been deprived of a fair trial because of it or a gross injustice is about to result or has resulted directly attributable to the alleged errors. *Central of Ga. Ry. v.*

Substantial Error as a Matter of Law (Cont'd)

2. Application (Cont'd)

Luther, 128 Ga. App. 178, 196 S.E.2d 149 (1973).

Error contemplated by subsection (c) is not harmful unless a gross miscarriage of justice attributable to it is about to result. *Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966); *Hawkins v. State*, 116 Ga. App. 448, 157 S.E.2d 800 (1967); *Central of Ga. Ry. v. Luther*, 128 Ga. App. 178, 196 S.E.2d 149 (1973); *Widener v. Mitchell*, 137 Ga. App. 730, 224 S.E.2d 868 (1976).

Subsection (c) is inapplicable unless it appears that error contended is blatantly apparent and prejudicial, and that gross miscarriage of justice attributable to it is about to result. *Metropolitan Transit Sys. v. Barnette*, 115 Ga. App. 17, 153 S.E.2d 656 (1967); *Bryant v. Housing Auth.*, 121 Ga. App. 32, 172 S.E.2d 439 (1970); *Sullens v. Sullens*, 236 Ga. 645, 224 S.E.2d 921 (1976); *Peek v. Department of Transp.*, 139 Ga. App. 780, 229 S.E.2d 554 (1976); *Sturdivant v. Polk*, 140 Ga. App. 152, 230 S.E.2d 115 (1976); *McGarr v. McGarr*, 239 Ga. 640, 238 S.E.2d 427 (1977); *Jefferson v. Johnson*, 143 Ga. App. 879, 240 S.E.2d 234 (1977); *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978); *Jim Walter Corp. v. Ward*, 150 Ga. App. 484, 258 S.E.2d 159 (1979); *Dehler v. Setliff*, 153 Ga. App. 796, 266 S.E.2d 516 (1980); *Mathews v. Taylor*, 155 Ga. App. 2, 270 S.E.2d 247 (1980).

Under subsection (c), nothing is presented for consideration on appeal unless it appears that error contended is blatantly apparent and prejudicial. *Foskey v. State*, 116 Ga. App. 334, 157 S.E.2d 314 (1967).

Under subsection (c), appellate court is empowered to review instructions which are substantially and harmfully erroneous as a matter of law, that is, error that is blatantly apparent and prejudicial to extent that it raises question as to whether losing party has to some extent at least been deprived of a fair trial because of it. *Hollywood Baptist Church v. State Hwy. Dep't*, 114 Ga. App. 98, 150 S.E.2d 271 (1966); *Simmons v. Edge*, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

Unless charge to which no objection is made is so blatantly prejudicial and results in gross miscarriage of justice such charge will

not be considered harmful as a matter of law. *Venable v. State Hwy. Dep't*, 138 Ga. App. 788, 227 S.E.2d 509 (1976).

Erroneous charge must be blatantly apparent and prejudicial to extent that it raises question as to whether losing parties have, to some extent, at least been deprived of a fair trial because of it to be considered harmful as a matter of law. *Dendy v. Metropolitan Atlanta Rapid Transit Auth.*, 163 Ga. App. 213, 293 S.E.2d 372 (1982), rev'd on other grounds, 250 Ga. 538, 299 S.E.2d 876 (1983).

Because the appellant stated that he had no objections to a jury charge when the court made inquiry, and did not show that the allegedly erroneous charge was blatantly apparent and prejudicial to the extent that it raised a question whether he had been deprived, to some extent, of a fair trial, he waived the right to raise the issue on appeal. *Maynard v. State*, 171 Ga. App. 605, 320 S.E.2d 806 (1984).

Instructions on assumption of risk and avoidance of consequences in battery. — In an action for battery, instructions on the principles of assumption of risk and avoidance of consequences by exercise of ordinary care for one's own safety created the strong risk of misleading the jury to conclude that the principles charged constituted defenses to battery, resulting in substantial, prejudicial error. *Williams v. Knight*, 211 Ga. App. 420, 439 S.E.2d 507 (1994).

Failure to charge on any legal theory of recovery is harmful as a matter of law. *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

New trial for failure, in charge, to give benefit of defense theory sustained by evidence. — Where, in charge, trial judge fails to give benefit of a theory of defense which is sustained by evidence, a new trial must be granted. *Fowler v. Gorrell*, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Failure to charge on defense of accident. — In an action to recover for injuries suffered when plaintiff fell from her horse during a riding lesson, when another horse got loose in the riding ring, the trial court erred by refusing to give a jury instruction on accident. *Smoky, Inc. v. McCray*, 196 Ga. App. 650, 396 S.E.2d 794 (1990).

Jury charge as to settlement with two co-defendants tending to confuse jury. —

Where the trial court's charge to the jury as to the plaintiffs' settlement with two co-defendants tended to confuse and mislead the jury, the case must be remanded to the trial court for a new trial, the magnitude of the error in the charge falls within the parameters of this Code section. *King Cotton, Ltd. v. Powers*, 190 Ga. App. 845, 380 S.E.2d 481 (1989).

Charge must be necessarily harmful to complaining party to constitute substantial error. — Under subsection (c), before appellate court will reverse trial court because of erroneous instruction not excepted to in trial court, it must appear that such charge was necessarily harmful to complaining party. Any charge which is not necessarily harmful to complaining party is not such substantial error as to require reversal of case, in absence of proper exception to the charge. *Moon v. Kimberly*, 116 Ga. App. 74, 156 S.E.2d 414 (1967).

Charge which failed to define the elements of rape, and which was compounded by gratuitous references to irrelevant matters such as whether "an actual theft occurred" and "criminal negligence," was substantially in error, was harmful as a matter of law, and deprived defendant of his right to a fair trial. *Phelps v. State*, 192 Ga. App. 193, 384 S.E.2d 260 (1989).

Charge precluding consideration of parties' rights unless third litigant prevails on independent issue. — Charge which would preclude jury from considering rights of two litigants unless third litigant prevails upon independent issue is tainted with substantial error. *King v. Browning*, 246 Ga. 46, 268 S.E.2d 653 (1980).

Error in instructing as to § 46-8-292, not harmful. — Error in instructing jury of § 46-8-292 (relating to proof of injury from running of train as prima-facie evidence of lack of reasonable skill and care) is not harmful to extent required to come within necessity of noting exception as required by subsection (c). *Central of Ga. Ry. v. Luther*, 128 Ga. App. 178, 196 S.E.2d 149 (1973).

Error in negligent entrustment charge. — Charge on negligent entrustment which omitted the element of "actual knowledge" constituted substantial error as a matter of law. *Roura v. State*, 214 Ga. App. 43, 447 S.E.2d 52 (1994); *Bloom v. Doe*, 214 Ga. App. 94, 447 S.E.2d 72 (1992).

Error induced by defense counsel not ground for new trial. — Where counsel in a criminal case introduces evidence on theory of defense and thereafter asks for no charge on valid defense and responds to court that he has no exceptions, error in charge is self-induced and will not be ground for new trial. *Mahomet v. State*, 151 Ga. App. 462, 260 S.E.2d 363 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1339, 63 L. Ed. 2d 776 (1980).

Where counsel acquiesces in giving of or failure to give instruction. — Subsection (c) refers only to failure to make objection to charge, and not to those instances where giving of instruction, or failure to give instruction, is specifically acquiesced in by counsel. *Brown v. Garcia*, 154 Ga. App. 837, 270 S.E.2d 63 (1980).

Acquisition of appellate jurisdiction over question of substantial error in charge. — If allegation of substantial error in charge is included in motion for new trial, jurisdiction of question for decision by appellate court is acquired in either of two ways: First, by specifically appealing from ruling on motion for new trial in notice of appeal and presenting such error in charge in enumeration of error, or, second, by filing notice of appeal from other appealable judgments and enumerating as error the ruling on motion for new trial. *Tiller v. State*, 224 Ga. 645, 164 S.E.2d 137 (1968).

Charge on element of intent. — Trial court's erroneous instruction that there is no requirement that the state allege or prove that defendant had intent to deliver drugs was reversible error even though a general instruction as to how criminal intent may be shown was given. *Jackson v. State*, 205 Ga. App. 513, 422 S.E.2d 673 (1992).

Failure to instruct on actual and constructive possession. — Where the prosecution and defense of a case turned on proof, or the lack of it, that each of three defendants had actual or constructive possession of the cocaine and other dangerous drugs found under the seat of the rented car in which the defendants were passengers, without any instruction on the law of possession, the jury was left without appropriate guidelines for reaching its verdict. The failure to so charge was substantial error and harmful as a matter of law and requires reversal of the convictions of both defendants. *Ancrum v. State*, 197 Ga. App. 819, 399 S.E.2d 574 (1990).

Substantial Error as a Matter of**Law (Cont'd)****2. Application (Cont'd)**

Failure to instruct jury to disregard testimony of defendant's character. — Trial court's failure to instruct the jury to disregard the testimony of defendant's general character or conduct in other transactions was an error which was so "blatantly apparent" and "highly prejudicial" as to deprive defendant, who failed to object to the testimony, of his right to a fair trial. *Barnett v. State*, 178 Ga. App. 685, 344 S.E.2d 665 (1986).

Failure to charge jury regarding prior convictions. — The failure of the trial court to charge the jury that prior convictions were admitted for a limited purpose and to describe that purpose was a substantial error which requires reversal. *Moore v. State*, 202 Ga. App. 476, 414 S.E.2d 705 (1992).

Failure to charge as to value of property as separate lots in condemnation case. — On plaintiff's appeal from jury verdict in condemnation case involving a tract of land subdivided into 40 individual lots, the trial court did not instruct as to plaintiff's contentions regarding the value of the property as separate lots, although it would not admit separate tax records for each lot as evidence of their total value, so that any failure to give further instructions did not fall within the "harmful as a matter of law" requirement necessary to invoke subsection (c). *Blume v. Richmond County*, 190 Ga. App. 366, 378 S.E.2d 694 (1989).

Reference to no-fault insurance law. — Where the plaintiff's attorney specifically requests the court to instruct the jury that the plaintiff can recover above the \$5,000

no-fault statute provisions, there is no substantial error requiring reversal in the court's referring to the Georgia no-fault insurance law during the course of the trial and in its charge to the jury. *Childers v. Morris*, 166 Ga. App. 229, 303 S.E.2d 769 (1983).

Slip of the tongue not substantial error. — Where, in a condemnation action, the use of "condemnees" rather than "condemnor" in the charge explaining the burden of proof is clearly inadvertent, a slip of the tongue, the error is not likely to confuse or mislead the jury and, thus, is not so substantial as to require reversal. *Morrison v. DOT*, 166 Ga. App. 144, 303 S.E.2d 501 (1983).

Charge regarding guilty plea. — In a negligence case, after the trial court charged the jury that there was evidence, via a traffic citation, of a plea of guilty by the defendant, which could be considered as an admission, it would have been appropriate to charge that, if the jury concluded no guilty plea was entered, they should disregard the citation, but in the absence of any such request or objection to its omission, there was no basis for reversal. The trial court gave the charge requested by the defendant, which informed the jury that evidence of the plea was not conclusive of the issues before it, and the court otherwise fully instructed the jury on the general principles of negligence. Under these circumstances the exception of subsection (c) was inapplicable, since even if the defendant did not acquiesce in the failure to charge, the charge as given did not amount to substantial error harmful as a matter of law. *Hunter v. Hardnett*, 199 Ga. App. 443, 405 S.E.2d 286, cert. denied, 199 Ga. App. 906, 405 S.E.2d 286 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 349-354.

C.J.S. — 66 C.J.S., New Trial, § 44.

ALR. — Duty to charge as to reasonable doubt as between different degrees of crime or included offenses, 20 ALR 1258.

Absence of evidence supporting charge of lesser degree of homicide as affecting duty of court to instruct as to, or right of jury to convict of, lesser degree, 21 ALR 603; 27 ALR 1097; 102 ALR 1019.

Use of emphatic words, like "great care," "utmost care," or "highest care," in instructing jury as to duty of carrier to passengers, 32 ALR 1190.

Instruction on evidence as to conspiracy where there is no charge of conspiracy in indictment or information, 66 ALR 1311.

Instructions disparaging defense of alibi, 67 ALR 122; 146 ALR 1377.

Failure of instruction on reasonable doubt to include phrase "lack of evidence" or

equivalent as reversible error, 67 ALR 1372.

Propriety of instructions which permit conviction notwithstanding difference between jurors as to which of two or more contradictory facts, each of which is consistent with guilt, was established by the evidence, 72 ALR 154.

Propriety of direction of verdict of guilty or of instruction or requested instruction requiring jury in criminal case to take the law from the court, or advising them as to their duty in that regard, 72 ALR 899.

Duty to instruct, and effect of failure to instruct, jury as to reduction to present worth of damages for future loss on account of death or personal injury, 77 ALR 1439; 154 ALR 796.

Premature motion for new trial and its effect, 78 ALR 1108.

Waiver of objection to testimony or evidence at one trial as affecting right to make objection on subsequent trial of same case, 79 ALR 173.

Furnishing or reading instructions to jury, in jury room, after retirement, as error, 96 ALR 899.

Trial court's allowance of a general exception to adverse rulings as obviating necessity of specific exceptions, 102 ALR 209.

Libel or slander: propriety, where actual damages are not shown, of instructions on compensatory damages which do not embody jury's right to award small or nominal damages, 122 ALR 853.

Duty of court in civil case to correct, and to give as corrected, a requested instruction which includes a clerical or inadvertent mistake, 125 ALR 685.

Propriety and effect of instruction or requested instruction which either affirms or denies jury's right to draw unfavorable inference against a party because he invokes privilege against testimony of person offered as witness by the other party or because he fails to call such person as a witness, 131 ALR 693.

Instruction mentioning or suggesting specific sum as damages in action for personal injury or death, 2 ALR2d 454.

Right of accused to additional argument on matters covered by amended or additional instructions, 15 ALR2d 490.

Error as to instructions on burden of proof under doctrine of *res ipsa loquitur* as prejudicial, 29 ALR2d 1390.

Absence of judge from courtroom during criminal trial prior to time of reception of verdict, 34 ALR2d 683.

Duty of trial court to instruct on self-defense, in absence of request by accused, 56 ALR2d 1170.

Right of defendant to complain, on appellate review, of instructions favoring codefendant, 60 ALR2d 524.

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166.

Instructions on sudden emergency in motor vehicle cases, 80 ALR2d 5.

Provision in Rule 51, Federal Rules of Civil Procedure, and similar state rules and statutes, requiring court to inform counsel, prior to argument to jury, of its proposed action upon requests for instructions, 91 ALR2d 836.

Giving, in accused's absence, additional instruction to jury after submission of felony case, 94 ALR2d 270.

Instructions in a personal injury action which, in effect, tell jurors that in assessing damages they should put themselves in injured person's place, 96 ALR2d 760.

Instruction as to possible effect of verdict on insurance rates as prejudicial error, 100 ALR2d 345.

Prejudicial effect of statement of court that if jury makes mistake in convicting it can be corrected by other authorities, 5 ALR3d 974.

Permitting documents or tape recordings containing confessions of guilt of incriminating admissions to be taken into jury room in criminal case, 37 ALR3d 238.

Duty of court, in absence of specific request, to instruct on subject of alibi, 72 ALR3d 547.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses, 72 ALR3d 617.

Instructions to jury: sympathy to accused as appropriate factor in jury consideration, 72 ALR3d 842.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 ALR3d 866.

Lesser-related state offense instructions: modern status, 50 ALR4th 1081.

5-5-25. Other grounds.

In all motions for a new trial on other grounds, not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts. (Orig. Code 1863, § 3642; Code 1868, § 3667; Code 1873, § 3718; Code 1882, § 3718; Civil Code 1895, § 5483; Penal Code 1895, § 1062; Civil Code 1910, § 6088; Penal Code 1910, § 1089; Code 1933, § 70-208.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DUTY AND DISCRETION OF COURT

APPLICATION

1. IN GENERAL
2. ADEQUACY OR LEGALITY OF DAMAGES
3. GROUNDS WARRANTING NEW TRIAL
4. GROUNDS INSUFFICIENT TO WARRANT NEW TRIAL
5. IMPROPER SUBJECT MATTER FOR MOTION FOR NEW TRIAL

General Consideration

Any ruling comprehended in scope of verdict may be urged in motion for new trial. *Carrington v. Brooks*, 121 Ga. 250, 48 S.E. 970 (1904).

This section is frequently construed with § 5-5-50, providing that first grant of new trial will not generally be disturbed. *Georgia S. & Fla. Ry. v. Bryan*, 15 Ga. App. 253, 82 S.E. 913 (1914); *Williams v. State*, 27 Ga. App. 224, 107 S.E. 620 (1921).

Ground of motion for new trial must be complete in itself, or rendered so by exhibit to motion. *Barber v. State*, 136 Ga. 831, 72 S.E. 248 (1911).

Grounds which cannot be understood without resort to brief of evidence. — Are insufficient grounds of motion which are incomplete and cannot be understood without resorting to brief of evidence fail to present any question for decision. *Head v. State*, 144 Ga. 383, 87 S.E. 273 (1915).

Generally, new trial is granted only as to matters foreign to record, such as misbehavior of party or juror. *Register v. State*, 12 Ga. App. 1, 76 S.E. 649 (1912), later appeal, 12 Ga. App. 688, 78 S.E. 142 (1913).

Judge who imposes sentence need not have presided at first trial. — It is not error for different judge to preside and impose

sentence than the one who presided at defendant's first trial. *Gresham v. State*, 149 Ga. App. 320, 254 S.E.2d 474 (1979).

Motions based on matters not appearing on face of record are in effect motions for new trial and are subject to all rules of law governing these motions. *Leiter v. Arnold*, 118 Ga. App. 108, 163 S.E.2d 235 (1968).

Approval of verdict necessary to finalize it where party moves for new trial on general grounds. — Before a verdict becomes final it should, where losing party requires by motion for new trial, receive approval of the mind and conscience of trial judge. Until his approval is given, verdict does not become binding in case where motion for new trial contains general grounds. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Georgia recognizes the extraordinary motion for new trial. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Cited in *Holland v. Williams*, 3 Ga. App. 636, 60 S.E. 331 (1908); *Martin & Sons v. Bank of Leesburg*, 137 Ga. 285, 73 S.E. 387 (1911); *Western & Atl. R.R. v. Hughes*, 278 U.S. 496, 49 S. Ct. 231, 73 L. Ed. 473 (1929); *Hawes v. Roles*, 49 Ga. App. 680, 176 S.E. 659

(1934); *Candler v. Smith*, 50 Ga. App. 667, 179 S.E. 395 (1935); *Carter v. Powell*, 57 Ga. App. 360, 195 S.E. 466 (1938); *City of Macon v. Herrington*, 198 Ga. 576, 32 S.E.2d 517 (1944); *Salter v. Salter*, 80 Ga. App. 263, 55 S.E.2d 868 (1949); *Schwall v. McNeil*, 232 Ga. 679, 208 S.E.2d 487 (1974); *Watts v. Six Flags Over Ga., Inc.*, 140 Ga. App. 106, 230 S.E.2d 34 (1976); *Smith v. Telecab of Columbus, Inc.*, 238 Ga. 559, 234 S.E.2d 24 (1977); *Hancock v. Oates*, 244 Ga. 175, 259 S.E.2d 437 (1979); *Johnson v. State*, 244 Ga. 295, 260 S.E.2d 23 (1979); *Jackson v. Bekele*, 152 Ga. App. 417, 263 S.E.2d 225 (1979); *Murray v. State*, 157 Ga. App. 596, 278 S.E.2d 2 (1981); *Griggs v. State*, 159 Ga. App. 219, 283 S.E.2d 77 (1981); *Willis v. State*, 249 Ga. 261, 290 S.E.2d 87 (1982); *Stewart v. State*, 165 Ga. App. 428, 300 S.E.2d 331 (1983); *Malone v. State*, 175 Ga. App. 379, 334 S.E.2d 222 (1985); *Towns v. State*, 185 Ga. App. 545, 365 S.E.2d 137 (1988); *Griffin v. Peters*, 262 Ga. 209, 415 S.E.2d 905 (1992).

Duty and Discretion of Court

Section is mere declaration of what law was when Code was adopted, and confers no right or power on court other than that already existing. It is an inherent power in superior court to review its own rulings. *Singer Mfg. Co. v. Lancaster*, 75 Ga. 280 (1885).

Discretion on grounds not otherwise provided for. — Section gives trial court discretion regarding new trials on grounds not specifically provided for by law. *Vaughan v. Car Tapes, Inc.*, 135 Ga. App. 178, 217 S.E.2d 436 (1975).

Discretion regarding extraordinary motions for new trial. — In considering all applications for new trial made on extraordinary grounds, trial judge is vested with sound legal discretion. *Johnson v. State*, 244 Ga. 295, 260 S.E.2d 23 (1979).

Discretion to grant or refuse new trials extends to second verdict. *Morgan v. Lamb*, 16 Ga. App. 484, 85 S.E. 792 (1915).

Judge who did not preside at trial has less discretion under section than presiding judge. *Throgmorton v. Trammell*, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

Appellate court is bound to recognize trial court's discretion to grant or refuse new trials. *Cargyle v. Belcher*, 43 Ga. 207 (1871).

Appellate courts have no discretion regarding new trials. — The law permits trial judge to refuse or grant new trials, in exercise of legal discretion, but it does not give appellate court any discretion in the matter; it can only grant new trials when errors of law have been committed, or when trial judge has abused his discretion in refusing new trial. *Prosser v. State*, 60 Ga. App. 604, 4 S.E.2d 499 (1939); *Holton v. State*, 61 Ga. App. 654, 7 S.E.2d 202 (1940).

Discretion extends to passing upon alleged prejudice and bias of juror. — Discretion of trial judge in passing upon alleged prejudice and bias of juror from conflicting evidence on motion for new trial will not be interfered with, unless it is manifestly abused. *Bradberry v. State*, 170 Ga. 859, 154 S.E. 334 (1930).

Where credibility of witnesses and weight of testimony involved. — Where credibility of witnesses and weight to be attached to testimony introduced is addressed solely to discretion of trial court in exercise of sound legal discretion, and where it appears that there was no abuse of discretion in a particular judgment, overruling motion for new trial must be affirmed. *Wallace v. Wallace*, 229 Ga. 607, 193 S.E.2d 832 (1972).

Trial judge presumed to exercise discretion required of him. — Where there is nothing in order overruling motion for new trial to indicate that judge was dissatisfied with verdict on discretionary grounds, but on contrary, in overruling motion on all grounds and refusing a new trial on all of them indicated his approval, appellate court will not say he abused his discretion, since trial judge is presumed to have known his obligation was to exercise legal discretion and that in overruling motion is presumed to have exercised this discretion. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Presumption that trial judge knew rule as to obligation to approve jury's verdict. — In interpreting language of order overruling motion for new trial, appellate court must presume that trial judge knew rule as to obligation to approve jury's verdict devolving upon him, and that in overruling motion he did exercise this discretion, unless language of order indicates to contrary and that court agreed to verdict against his own judgment and against dictates of his own con-

Duty and Discretion of Court (Cont'd)

science, merely because he did not feel that he had duty or authority to override findings of jury upon disputed issues of fact. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

First grant of new trial by judge not presiding throughout trial, generally not disturbed. — First grant of new trial by judge who did not preside during whole trial will not be disturbed, unless evidence demanded verdict rendered. *Throgmorton v. Trammell*, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

Failure to rule on motion under § 9-11-16. — Where record disclosed no direct ruling on motion pursuant to § 9-11-16 or that such ruling was ever requested, although motion was filed, there was no reversible error in failing to consider it. *International Ass'n of Bridge Ironworkers, Local 387 v. Moore*, 149 Ga. App. 431, 254 S.E.2d 438 (1979).

Trial court errs in ignoring mandate of § 9-11-16 requiring pretrial conference upon timely motion. *International Ass'n of Bridge Ironworkers, Local 387 v. Moore*, 149 Ga. App. 431, 254 S.E.2d 438 (1979).

Where question of substantive fact (not decision of law) is submitted to judge for trial, without the intervention of a jury, his decision as to the facts is as binding upon the parties as a verdict and may be set aside under the same rules as apply to the vacating of the finding of a jury. *Sunn v. Mercury Marine*, 166 Ga. App. 567, 305 S.E.2d 6 (1983).

Application

1. In General

Nonappearance of party or counsel for good cause may be raised in motion for new trial. *Vaughan v. Car Tapes, Inc.*, 135 Ga. App. 178, 217 S.E.2d 436 (1975).

Grants of such motions not disturbed absent manifest abuse of discretion. *Vaughan v. Car Tapes, Inc.*, 135 Ga. App. 178, 217 S.E.2d 436 (1975).

To obtain new trial due to defendant's absence or absence of his counsel at trial, defendant must show that he was without fault, and that he had a good defense to action. *Haralson County Economic Dev.*

Corp. v. Hammock, 233 Ga. 381, 211 S.E.2d 278 (1974).

Motion under this section for new trial on grounds of movant's absence from trial, such motion addressing itself to sound discretion of trial judge, movant must show both that he was diligent in his own behalf or without fault and that he had a meritorious defense. *Newman v. Greer*, 131 Ga. App. 128, 205 S.E.2d 486 (1974).

To obtain new trial due to absence of counsel, it must be shown that party was without fault and that he had good defense to action. *Bloodworth v. Caldwell*, 150 Ga. App. 443, 258 S.E.2d 64 (1979).

Application for new trial on ground of defendant's absence, although addressed to sound legal discretion of trial judge must be supported by showing of some meritorious explanation of absence, as well as a meritorious defense. *Southern Ariz. Sch. for Boys, Inc. v. Morris*, 123 Ga. App. 67, 179 S.E.2d 548 (1970).

Where it appears from motion for new trial that defendant, without fault or lack of diligence on his part or on that of his counsel, has been precluded from trying his case on its merits in such manner that substantial injustice may have been done to him, it is not an abuse of discretion to grant original motion for new trial. *Robinson v. Modern Coach Corp.*, 91 Ga. App. 440, 85 S.E.2d 826 (1955).

In extraordinary circumstances, motion for new trial may be brought under this section and trial court must use sound legal discretion to grant new trial where defendant, without fault or lack of diligence on part of himself or his counsel, has been precluded from trying his case on its merits in such manner that substantial injustice may have been done to him. *Lee v. Southeastern Plumbing Supply Co.*, 145 Ga. App. 465, 244 S.E.2d 33 (1978).

Showing which permits new trial from adverse default judgment. — Where motion for new trial sets up facts from which it appears that defendant's lack of knowledge of proceedings, which resulted in adverse default judgment was through no fault of its own; that it had no knowledge of proceedings; that person upon whom service was made had no authority from it to accept service of process; that defendant had meritorious defense which would, upon another

trial of case, lead to contrary result; and that, after being informed of default judgment against it, it immediately used all diligence possible to bring true facts before court, motion presents such a state of facts that first grant of new trial by trial judge does not constitute abuse of discretion. *Robinson v. Modern Coach Corp.*, 91 Ga. App. 440, 85 S.E.2d 826 (1955).

Where defendant is ill, he must notify court and obtain continuance if time permits. — Where defendant had ample opportunity to inform court of his sickness and obtain continuance, but failed to do so, new trial will not be granted on ground of his absence. *Shivers v. State*, 53 Ga. 149 (1874); *Smith v. Fisher*, 23 Ga. App. 245, 98 S.E. 96 (1919).

Defendant must exercise diligence in employing new counsel before trial. — It is not error to refuse new trial at instance of defendant who could have, in exercise of diligence, been present with counsel, which she had ample opportunity to employ, after withdrawal of counsel already representing her. *Diprima v. Hicks*, 89 Ga. App. 231, 79 S.E.2d 8 (1953).

Remedy for erroneous failure to hold party in contempt of court. — Motion for new trial is proper remedy for attacking judgment holding that party is not in contempt of court for failing to abide by alimony judgment. *Berman v. Berman*, 231 Ga. 216, 200 S.E.2d 870 (1973).

Jury misconduct to warranting new trial. — For misconduct of jury to be cause for new trial it must affirmatively appear that neither party complaining nor his counsel had any knowledge of such misconduct before verdict. *Schmidt v. Parrish*, 63 Ga. App. 663, 11 S.E.2d 921 (1940).

Use of perjured testimony at preliminary hearing. — Where perjured testimony is used at preliminary hearing but not at trial, and where appellant does not demonstrate that testimony contributed to his conviction, there is no abuse of discretion in judge's refusing to grant appellant's motion for new trial. *Johnson v. State*, 244 Ga. 295, 260 S.E.2d 23 (1979).

Insufficiency of petition cannot be reached by exception to sufficiency of evidence in motion for new trial. *Huson v. Farmer*, 53 Ga. App. 131, 185 S.E. 119 (1936).

Claim of incompetence of counsel. — This catch-all section appears to be an appropriate vehicle for a claim that a new trial should be granted because counsel incompetently failed to timely move for a new trial on newly discovered evidence. *House v. Balkcom*, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

2. Adequacy or Legality of Damages

Jury's discretion regarding damages does not limit trial judge's discretion. — Broad discretion of jury as to amount of damages is not a limitation on discretion of trial judge to set aside verdict when he thinks it unfair, unjust, contrary to evidence, excessive, or too small; but is a persuasive influence not lightly to be disregarded. Trial judge is not to substitute his opinion for that of jury, but merely sends case for opinion of another jury. *Hornsby v. Davis*, 112 Ga. App. 419, 145 S.E.2d 633 (1965).

Rules governing jury's right to fix damages and courts' rights regarding new trials exist independently. — Rules of law governing (1) right of jury to originally fix damages, (2) right of appellate court to grant new trial where verdict is alleged to be excessive or inadequate, and (3) right of trial judge to grant new trial where in his discretion he thinks verdict unfair, unjust, contrary to evidence, excessive, or too small, exist apart from and independent of each other. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Discretion in determination of legal adequacy of verdict for damages. — Determination of question, as to whether verdict for damages is inadequate in legal sense, lies within sound discretion of trial court. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Mere difference of opinion between appellate court and jury is insufficient. — New trial should not be granted due to mere difference of opinion between appellate court and jury as to amount of recovery in action of tort for unliquidated damages. Something more must be disclosed to warrant interference, where substantial damages have been returned. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Application (Cont'd)**2. Adequacy or Legality of Damages (Cont'd)**

New trial regarding damages where unliquidated, tort damages involved. — When action sounds in tort, for recovery of unliquidated damages, to measurement of which no fixed rule of law can be applied, appellate court ought not to set aside verdict of jury simply because damages are, in its opinion, inadequate or excessive, unless it clearly appears that verdict is so grossly inadequate or excessive as to afford evidence of bias, passion, or prejudice, or of mistake and oversight, in failing to take into consideration the proper elements of damage in assessing amount of recovery. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Where he can conscientiously acquiesce in verdict, trial judge should approve it. — If trial court can conscientiously acquiesce in amount awarded in verdict, though it may not exactly accord with his best judgment or though some other finding might seem somewhat more satisfactory to his mind, and if his sense of justice is reasonably satisfied, he should, in absence of some material error of law affecting trial, approve it, and an appellate court will uphold him in so doing, and will not say that he abused his discretion. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Abuse of discretion is prerequisite to interference with denial of new trial. — Where trial judge refuses to order new trial on ground of inadequate damages in tort action, appellate court will interfere with that discretion only in case of manifest abuse. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

3. Grounds Warranting New Trial

Misconduct, mistake, surprise, and prejudice. — Misconduct, mistake, surprise, and prejudice, and other grounds of failure, are provided against by expedience of new trial under this section. *Central of Ga. Ry. v. Harden*, 113 Ga. 453, 38 S.E. 949 (1901).

Absence of party from providential cause unknown to his counsel is valid ground for motion for new trial. *Hayes v. States*, 91 Ga. 43, 16 S.E. 270 (1892).

When accused is forced to trial only with advice of counsel then and there appointed.

— When counsel's absence is due to unintentional statement of solicitor (now district attorney) and accused is forced to trial with advice only of attorney then and there appointed by court, new trial will be granted. *Johnson v. State*, 1 Ga. App. 729, 57 S.E. 1056 (1907).

Illness of leading counsel for accused before trial concludes, so that he is not able to give case the degree of care it requires, is ground for new trial. *Flanagan v. State*, 106 Ga. 109, 32 S.E. 80, 71 Am. St. R. 242 (1898).

Defendant prisoner absent because of imprisonment. — For rendition of guilty verdict to charge of murder in prisoner's absence, without his consent, while he is in jail, motion for new trial is an available remedy. *Frank v. State*, 142 Ga. 741, 83 S.E. 645, 1915D L.R.A. 817, writ of error denied, 235 U.S. 694, 35 S. Ct. 208, 59 L. Ed. 429 (1914).

Abridgment of right of cross-examination. — When trial judge unduly abridges right of cross-examination, it is ground for a new trial. *Strickland v. State*, 6 Ga. App. 536, 65 S.E. 300 (1909).

Deprivation of right to opening and closing arguments. — Right to opening and closing arguments is a material one, and where claimants are deprived of it, they are entitled to new trial. *Smith v. Dickens*, 42 Ga. App. 168, 155 S.E. 510 (1930).

Judge's expression of opinion on evidence. — Any expression or intimation by judge of opinion as to what has or has not been proved renders grant of new trial necessary. *Lovejoy v. State*, 82 Ga. 87, 8 S.E. 66 (1888); *Wright v. State*, 5 Ga. App. 813, 63 S.E. 936 (1909).

Address to jury not authorized by evidence. — Where solicitor-general, (now district attorney) in address to jury, uses highly improper language not authorized by evidence or any fair deduction therefrom, and counsel for accused objects thereto and moves court to declare mistrial which is refused, new trial will be granted in interest of justice. *Ficken v. State*, 97 Ga. 813, 25 S.E. 925 (1895).

Where sheriff enters jury room while case is under consideration. — Jury cannot be put in charge of sheriff who is acting as prosecutor, and if sheriff goes into jury room while they have case under consideration

this is good ground for new trial. *Griffin v. State*, 5 Ga. App. 43, 62 S.E. 685 (1908).

Where jury acts from improper considerations, such as passion, partiality, or corruption, in rendering its verdict, new trial will be granted. *Flanagan v. State*, 106 Ga. 109, 32 S.E. 80, 71 Am. St. R. 242 (1898).

Disqualification or incompetence of juror not waived by knowledge. — New trial is demanded where there is no doubt as to disqualification or incompetence of juror and where such disqualification has not been waived by knowledge thereof; for reason that verdict is illegal and void. *Ferguson v. Bank of Dawson*, 53 Ga. App. 309, 185 S.E. 602 (1936).

Late knowledge of disqualifying relationship between juror and prosecutor. — Where it appears that juror is related within prohibited degree to prosecutor, law declares disqualification; and where such relation is unknown to accused until after verdict, new trial will be granted. *Harris v. State*, 188 Ga. 745, 4 S.E.2d 651 (1939).

Juror in criminal case who is related, by blood or marriage, within sixth degree to prosecutor, ascertained according to rules of civil law, is disqualified; and such disqualification, which was unknown to defendant or his counsel until after verdict, or which could not have been ascertained by either of them before verdict by exercise of due diligence, is cause for new trial. *Tatum v. State*, 206 Ga. 171, 56 S.E.2d 518 (1949).

Where disqualification of juror because of interest, etc., is shown to be true without dispute, and same was not known to movant or his counsel until after verdict and they could not have discovered same by exercise of due diligence, it is error for court to refuse movant's motion for new trial, and this is so even though juror filed affidavit that he was not prejudiced on that account. *Ferguson v. Bank of Dawson*, 53 Ga. App. 309, 185 S.E. 602 (1936).

New trial granted where defendant was absent by leave of court. *Pioneer Mfg. Co. v. Callaway & Co.*, 76 Ga. 105 (1885).

New trial granted where defendant physician was absent on urgent case. *Powell v. Westmoreland*, 49 Ga. 341 (1873).

New trial granted for error in refusing continuance. *Bagley & Willet v. Shumate*, 128 Ga. 78, 57 S.E. 99 (1907).

Improper and prejudicial argument by counsel is ground for new trial. *Johnson v.*

State, 88 Ga. 606, 15 S.E. 667 (1891).

Where person who had charge of jury was not sworn requires new trial. *Roberts v. State*, 72 Ga. 673 (1884); *Washington v. State*, 138 Ga. 370, 75 S.E. 253 (1912).

Reading newspaper editorials which destroy freedom of mind of juror is cause for new trial. *Styles v. State*, 129 Ga. 425, 59 S.E. 249, 12 Ann. Cas. 176 (1907).

4. Grounds Insufficient to Warrant New Trial

Harmless error. — Where it affirmatively appears that error has not resulted in injury, no new trial will be granted therefor; and in determining whether error has resulted in injury, court may look to record as a whole. *Shefton v. State*, 52 Ga. App. 103, 182 S.E. 528 (1935).

Defendant's absence, due to lack of diligence. — It is no ground for new trial that defendant, through lack of diligence, failed to be present upon call of case. *Diprima v. Hicks*, 89 Ga. App. 231, 79 S.E.2d 8 (1953).

Counsel's failure to appear for trial or notify client is insufficient ground to authorize new trial. *Haralson County Economic Dev. Corp. v. Hammock*, 233 Ga. 381, 211 S.E.2d 278 (1974).

Not knowing case was set for trial. — Mere fact that counsel and clients had no knowledge that case was on calendar and set for trial is not in itself sufficient to support grant of new trial. *Southern Ariz. Sch. for Boys, Inc. v. Morris*, 123 Ga. App. 67, 179 S.E.2d 548 (1970).

Not knowing when case would be called. — Mere fact that plaintiff's counsel did not know exactly when case would be called, and so was not present to ask for continuance resulting in dismissal, was not ground for new trial, nor was fact that counsel was trying case in another court. *Georgia v. Handshakers, Inc.*, 140 Ga. App. 641, 231 S.E.2d 575 (1976).

Failure to disclose unknown reward. — The trial court did not err in denying motion for a new trial where the state did not disclose a potential reward for one of its witnesses where the state's attorney did not know at the time of trial that any witness testifying for the state was subject to a reward. *McBee v. State*, 210 Ga. App. 182, 435 S.E.2d 469 (1993).

Application (Cont'd)**4. Grounds Insufficient to Warrant New Trial (Cont'd)**

Erroneous disallowance of challenge of juror for cause. — Where it did not affirmatively appear from record that defendant in trial of misdemeanor case had exhausted his peremptory challenges at time panel of 12 jurors was accepted and sworn, appellate court presumed that he was not prejudiced by action of court in erroneously disallowing his challenge of certain jurors for cause, and did not grant reversal for alleged error. *Borders v. State*, 46 Ga. App. 212, 167 S.E. 213 (1932).

Charging entire Code section where parts are inapplicable. — It is not usually cause for a new trial that an entire Code section is given, even though a part of the charge may be inapplicable under the facts in evidence. *Stevens v. State*, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S.Ct. 3551, 77 L. Ed. 2d 1398 (1982).

Denial of motion to strike testimony on cross-examination as hearsay. — Where a trial court overrules a motion to strike testimony on cross-examination as being hearsay because counsel had had an opportunity previously to object to that testimony, had let it become evidence, and had called it to the attention of the witness, thus being the party going into the matter and allowing the opposing party to cross-examine him with reference thereto, the admission of this evidence over a party's objection will, in no event, require the grant of a new trial when that party had substantially the same evidence admitted without objection. *Hill Aircraft & Leasing Corp. v. Tyler*, 161 Ga. App. 267, 291 S.E.2d 6 (1982).

Conversation between victim and juror. — There was no need for a new trial where the victim, while sitting down outside the courtroom awaiting the start of the day's proceedings, was joined by a juror who sat down next to the victim and made a casual remark concerning the weather; the victim made a noncommittal response and the juror upon recognizing the victim as a witness, left the side of the witness and engaged in no further conversation. *Kennedy v. State*, 179 Ga. App. 587, 347 S.E.2d 604 (1986).

5. Improper Subject Matter for Motion for New Trial

Order overruling motion to dismiss. — Order overruling a demurrer (now motion to dismiss) is not proper ground of motion for new trial. *Dixon v. Evans*, 56 Ga. App. 583, 193 S.E. 470 (1937).

Overruling of demurrer (now motion to dismiss) to dispossessory warrant was reviewable by exceptions either direct or pendente lite, but not by motion for a new trial. *Hinton v. Jackson*, 78 Ga. App. 62, 50 S.E.2d 254 (1948).

Rulings upon sufficiency of pleadings are not proper subject-matter for motion for new trial. *McJenkin Ins. & Realty Co. v. Burton*, 92 Ga. App. 832, 90 S.E.2d 27 (1955).

Rulings on pleadings cannot be made a ground of a motion for new trial. *Davis v. Buie*, 197 Ga. 835, 30 S.E.2d 861 (1944); *Southeastern Air Serv., Inc. v. Carter*, 78 Ga. App. 8, 50 S.E.2d 156 (1948).

Ruling of court in striking plea cannot be made ground of motion for new trial. *Finance Serv. Co. v. Rich*, 41 Ga. App. 831, 155 S.E. 60 (1930).

Exception to allowance of amendment allegedly changing cause of action from one on breach of express warranty to one for breach of implied warranty cannot be made in motion for new trial. *Watkins v. Muse*, 78 Ga. App. 17, 50 S.E.2d 90 (1948).

Objection to ruling on motion to strike amendment to defendant's answer is not proper ground of motion for new trial. *Cantrell v. Kaylor*, 203 Ga. 157, 45 S.E.2d 646 (1947).

Exception to denial of motion to quash indictment cannot be properly made ground of motion for new trial. *Fraday v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955).

Trial court's judgment overruling challenge to array cannot be brought into review by motion for new trial. *Ivey v. State*, 84 Ga. App. 72, 65 S.E.2d 282 (1951).

Objection that sentence imposed in criminal case is for any reason illegal or irregular cannot be made ground of motion for new trial. *Wilson v. State*, 84 Ga. App. 703, 67 S.E.2d 164 (1951).

Constitutional questions cannot be raised for first time by motion for new trial. *Tucker*

v. City of Atlanta, 211 Ga. 157, 84 S.E.2d 362 (1954).

One who has filed plea of guilty in criminal case cannot move for new trial. *Welch v. State*, 63 Ga. App. 277, 11 S.E.2d 42 (1940).

Motion for new trial cannot be employed to withdraw guilty plea. — Plea of guilty may, as a matter of right, be withdrawn before sentence, and after sentence judge may permit it to be withdrawn upon meritorious grounds, addressed to his discretion, but neither before nor after sentence can motion for new trial be employed as means of withdrawing a plea of guilty. *Welch v. State*,

63 Ga. App. 277, 11 S.E.2d 42 (1940).

Objections which go to judgment only. — Movant cannot in motion for new trial properly assign error on judgment entered upon verdict. *Kinsey v. Avans*, 196 Ga. 428, 26 S.E.2d 787 (1943).

Objections which go to judgment only, and do not extend to verdict, cannot properly be made grounds of motion for new trial; no new trial is necessary to correct judgment or decree. If judgment or decree is erroneous or illegal, direct exception should be taken to it at proper time. *Smith v. Wood*, 189 Ga. 695, 7 S.E.2d 255 (1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 83-95.

C.J.S. — 23A C.J.S., Criminal Law, §§ 1428-1445. 66 C.J.S., New Trial, §§ 13-32 et seq.

ALR. — Contract between juror and party or attorney during trial of civil case as ground for new trial, 55 ALR 750; 62 ALR2d 298.

Duty of attorney to call witness or to procure or aid in procuring his attendance, 56 ALR 174.

Conduct of party in court room tending improperly to influence jury as ground for reversal or new trial, 57 ALR 62.

Incompetency, negligence, illness, or the like, of counsel, as a ground for new trial or reversal in criminal case, 64 ALR 436.

Comments by judge during examination or cross-examination of defendant in criminal trial as ground for new trial or reversal, 65 ALR 1270.

Instruction or evidence as to conspiracy where there is no charge of conspiracy in indictment or information, 66 ALR 1311.

Statement by witness after criminal trial tending to show that his testimony was perjured as ground for new trial, 74 ALR 757; 158 ALR 1062.

Counsel's appeal to racial, religious, social, or political prejudices or prejudice against corporations as ground for a new trial or reversal, 78 ALR 1438.

Right of court to instruct or to communicate with jury in civil case in absence of counsel, 84 ALR 220.

Irregularity in drawing names for a jury panel as ground of complaint by defendant in criminal prosecution, 92 ALR 1109.

Excusing qualified juror drawn in criminal case as ground of complaint by defendant, 96 ALR 508.

Knowledge by defendant or his attorney, before return of verdict in criminal case, of misconduct in connection with jury after their retirement as affecting right to new trial or reversal, 96 ALR 530.

Furnishing or reading instructions to jury, in jury room, after retirement, as error, 96 ALR 899.

Brief voluntary absence of defendant from court room during trial of criminal case as ground of error, 100 ALR 478.

Inability to perfect record for appeal as ground for new trial, 107 ALR 603.

Failure to comply with statute, constitutional provision, or court rule providing for giving instructions to jury in writing as prejudicial or reversible error, 115 ALR 1332.

Disqualifying relationship unknown to juror as ground of new trial in criminal case, 116 ALR 679.

Remedy of one convicted of crime while insane, 121 ALR 267.

Impersonation or false statement by juror as to his identity as ground for new trial, 127 ALR 717.

Statements, comments, or conduct of court or counsel regarding perjury, as ground for new trial or reversal in civil action or criminal prosecution other than for perjury, 127 ALR 1385.

Physical condition or conduct of party, his family, friends, or witnesses during trial, tending to arouse sympathy of jury, as ground for continuance or mistrial, 131 ALR 323.

Statements by a witness after criminal trial tending to show that his testimony was perjured, as ground for new trial, 158 ALR 1062.

Reversal upon appeal by, or grant of new trial to, one coparty defendant against whom judgment was rendered, as affecting judgment in favor of other coparty defendants, 166 ALR 563.

Statements of witness in civil action secured after trial, inconsistent with his testimony, as basis for new trial on ground of newly discovered evidence, 10 ALR2d 381.

Conditioning the setting aside of judgment or grant of new trial on payment of opposing attorney's fees, 21 ALR2d 863.

Prejudicial effect of argument or remark that adversary was attempting to suppress facts, 29 ALR2d 996.

Absence of judge from courtroom during criminal trial prior to time of reception of verdict, 34 ALR2d 683.

Grant of new trial on issue of liability alone, without retrial of issue of damages, 34 ALR2d 988.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166.

Contact or communication between juror and party or counsel during trial of civil case as ground for mistrial, new trial, or reversal, 62 ALR2d 298.

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 ALR2d 158.

Propriety, and effect as double jeopardy, of court's grant of new trial on own motion in criminal case, 85 ALR2d 486.

Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 ALR3d 1191.

Prejudicial effect of statement of prosecutor that if jury makes mistake in convicting it can be corrected by other authorities, 3 ALR3d 1448.

Absence of judge from courtroom during trial of civil case, 25 ALR3d 637.

Counsel's reference in criminal case to wealth, poverty, or financial status of defendant or victim as ground for mistrial, new trial, or reversal, 36 ALR3d 839.

Discussion, during jury deliberation, of possible insurance coverage as prejudicial misconduct, 47 ALR3d 1299.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers, as ground for mistrial, new trial, or reversal, 93 ALR3d 556.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

Prejudicial effect of jury's procurement or use of book during deliberations in civil cases, 31 ALR4th 623.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases, 35 ALR4th 626.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal — Post-Parker cases, 35 ALR4th 890.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 ALR4th 1170.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal, 46 ALR4th 11.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 ALR4th 1049.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial, 60 ALR4th 1063.

Modern status of sudden emergency doctrine, 10 ALR5th 680.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities, 10 ALR5th 709.

ARTICLE 3

PROCEDURE

Cross references. — Disqualification of judge from presiding over new trial if he expresses approval or disapproval of jury verdict, § 9-10-8. Joining of motion for new trial with motion for directed verdict, §§ 9-11-50, 17-9-22.

JUDICIAL DECISIONS

Single motion for new trial improper where different judgments entered as to parties tried together. — In suit between different parties tried together wherein different verdicts and judgments were entered, it is not proper for single motion for new trial to be filed in name of both plaintiffs. *Allen v. Woods*, 44 Ga. App. 430, 161 S.E. 655 (1931) (decided under former Code 1933, § 70-301).

RESEARCH REFERENCES

ALR. — Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded, 98 ALR 941; 29 ALR2d 1199. Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

Propriety of increased punishment on new trial for same offense, 12 ALR3d 978.

5-5-40. Time of motion for new trial generally; amendments; extension of time for filing transcript; time of hearing; priority to cases in which death penalty imposed; appeal not limited to grounds urged; new trial on court's own motion.

(a) All motions for new trial, except in extraordinary cases, shall be made within 30 days of the entry of the judgment on the verdict or entry of the judgment where the case was tried without a jury.

(b) The motion may be amended any time on or before the ruling thereon.

(c) Where the grounds of the motion require consideration of the transcript of evidence or proceedings, the court may in its discretion grant an extension of time, except in cases where the death penalty is imposed, for the preparation and filing of the transcript, which may be done any time on or before the hearing; or the court may in its discretion hear and determine the motion before the transcript of evidence and proceedings is prepared and filed.

(d) The grounds of the motion need not be approved by the court.

(e) The motion may be heard at any time; but, where it is not heard at the time specified in the order, it shall stand for hearing at such time as the court by order at any time may prescribe, unless sooner disposed of.

(f) Motions for new trial in cases in which the death penalty is imposed shall be given priority.

(g) On appeal, a party shall not be limited to the grounds urged in the motion or any amendment thereof.

(h) The court also shall be empowered to grant a new trial on its own motion within 30 days from entry of the judgment, except in criminal cases where the defendant was acquitted. (Orig. Code 1863, § 3643; Code 1868, § 3668; Code 1873, § 3719; Code 1882, § 3719; Ga. L. 1889, p. 83, § 1; Civil Code 1895, § 5484; Penal Code 1895, § 1063; Civil Code 1910, § 6089; Penal Code 1910, § 1090; Code 1933, § 70-301; Ga. L. 1965, p. 18, § 16; Ga. L. 1973, p. 159, § 5.)

Cross references. — Death penalty generally, § 17-10-30 et seq.

Law reviews. — For article outlining proposed revisions of appellate procedure rules with comments, prior to the adoption of the Appellate Practice Act, see 19 Ga. B.J. 145 (1956). For article, "A Discussion of the 1957 Amendments to Rules of Practice and Procedure in Georgia," see 19 Ga. B.J. 395 (1957). For article discussing results of legislative changes in appellate procedure, prior to the enactment of the Appellate

Practice Act, see 20 Ga. B.J. 38 (1957). For article discussing the preparation of an amended motion for new trial and facts concerning appellate practice in general, prior to the adoption of the Appellate Practice Act, see 21 Ga. B.J. 424 (1959). For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TRANSCRIPT

MOTION

1. IN GENERAL
2. TIME FOR FILING
3. AMENDMENT

APPLICATION

General Consideration

Editor's notes. — In light of the similarity of the subject matter dealt with in the provisions, decisions under former Code 1873, § 3719; former Civil Code 1895, § 5484; former Civil Code 1910, § 6089; former Penal Code 1910, § 1090; and former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16, are included in the annotations for this Code section.

Section clearly imports that movant for new trial is entitled to hearing. Shockley v. State, 230 Ga. 869, 199 S.E.2d 791 (1973).

Motion for new trial made more than 30 days after entry of judgment is an "extraordinary" motion. Dyal v. State, 121 Ga. App. 50, 172 S.E.2d 326 (1970).

Extraordinary motions are authorized indirectly by this section and § 5-5-41. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Hearing on motion required. — Under this section and § 5-5-41, the trial court is required to hold a hearing on a motion for new trial. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Date for hearing on motion for new trial. — Where the date for the hearing on a motion for new trial is left blank, the time of the hearing is "indefinite" and the hearing may be heard at any succeeding term. Whitton v. State, 174 Ga. App. 634, 331 S.E.2d 10 (1985).

No law requires that motion for new trial be set down for a hearing. McClure v. State, 163 Ga. App. 236, 293 S.E.2d 496 (1982).

There is no law that a motion cannot be

summarily heard instanter. McClure v. State, 163 Ga. App. 236, 293 S.E.2d 496 (1982).

Trial court did not err in hearing motion for new trial immediately after it was filed and prior to preparation of transcript and proceedings, where evidence at trial was fresh in its memory at that particular point in time. McClure v. State, 163 Ga. App. 236, 293 S.E.2d 496 (1982).

No hearing as to extraordinary motion showing no merit. — An extraordinary motion for new trial which fails to show any merit may be denied without the necessity of a hearing. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Summary denial where movant fails to follow procedure. — Due process and equal protection rights are not violated by a trial court's summary denial of a movant's extraordinary motion for new trial, when he fails to comply with the procedural requirements of state law. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Continuance properly denied. — Where defense counsel had approximately four months to prepare for the hearing on his motion for new trial and during this time, he had access to the entire trial transcript and all matters of record filed with the superior court clerk's office, even though the defendant's counsel may not have had access to the transcripts of the pre-trial hearings, he did have ample time to consult with his client, study the evidence presented at trial, and review all of defendant's written pre-trial motions, so the trial court did not abuse its discretion in denying defendant's motion to continue. Isbell v. State, 179 Ga. App. 363, 346 S.E.2d 857 (1986), cert. denied, 479 U.S. 1098, 107 S. Ct. 1319, 94 L. Ed. 2d 172 (1987).

Cited in Mobley v. State, 221 Ga. 716, 146 S.E.2d 735 (1966); Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966); Cloer v. Vulcan Elec. Co., 113 Ga. App. 766, 149 S.E.2d 722 (1966); White Oak Acres, Inc. v. Campbell, 113 Ga. App. 833, 149 S.E.2d 870 (1966); Wright v. Wright, 222 Ga. 777, 152 S.E.2d 363 (1966); McRae v. State, 116 Ga. App. 407, 157 S.E.2d 646 (1967); A.M. Kidder & Co. v. Clement A. Evans & Co., 117 Ga. App. 346, 160 S.E.2d 869 (1968); Gibson Prods. Co. v. Addison, 120 Ga. App. 37, 169 S.E.2d 374 (1969);

Whiteway Laundry & Dry Cleaners, Inc. v. Childs, 126 Ga. App. 617, 191 S.E.2d 454 (1972); Berman v. Berman, 231 Ga. 216, 200 S.E.2d 870 (1973); Lenny v. Lenny, 235 Ga. 358, 220 S.E.2d 1 (1975); Barfield v. McEntyre, 136 Ga. App. 294, 221 S.E.2d 58 (1975); Peyton v. Peyton, 236 Ga. 119, 223 S.E.2d 96 (1976); Adair v. Adair, 236 Ga. 443, 224 S.E.2d 21 (1976); Davis v. Davis, 139 Ga. App. 599, 229 S.E.2d 81 (1976); Watts v. Six Flags Over Ga., Inc., 140 Ga. App. 106, 230 S.E.2d 34 (1976); Venable v. Block, 141 Ga. App. 523, 233 S.E.2d 878 (1977); Williams v. State, 144 Ga. App. 42, 240 S.E.2d 311 (1977); Martin v. State, 240 Ga. 488, 241 S.E.2d 246 (1978); Shoemaker v. Department of Transp., 240 Ga. 573, 241 S.E.2d 820 (1978); Stone v. State, 144 Ga. App. 843, 242 S.E.2d 749 (1978); Norman v. Allen, 148 Ga. App. 66, 251 S.E.2d 20 (1978); Mayo v. State, 148 Ga. App. 213, 251 S.E.2d 80 (1978); Parker v. State, 151 Ga. App. 139, 259 S.E.2d 145 (1979); Baxter v. Weiner, 246 Ga. 28, 268 S.E.2d 619 (1980); Bennett v. Caton, 154 Ga. App. 515, 268 S.E.2d 786 (1980); Randall & Blakely, Inc. v. Krantz, 155 Ga. App. 238, 270 S.E.2d 265 (1980); Herring v. Herring, 246 Ga. 462, 271 S.E.2d 857 (1980); Glennville Wood Preserving Co. v. Riddlespur, 156 Ga. App. 578, 276 S.E.2d 248 (1980); Grant v. State, 159 Ga. App. 2, 282 S.E.2d 668 (1981); Gates Rental, Inc. v. Perry, 164 Ga. App. 297, 297 S.E.2d 79 (1982); Hack v. State, 168 Ga. App. 927, 311 S.E.2d 211 (1983); Levitt v. State, 170 Ga. App. 32, 316 S.E.2d 6 (1984); Batson v. First Nat'l Bank, 170 Ga. App. 803, 318 S.E.2d 227 (1984); Neese v. Long, 178 Ga. App. 105, 341 S.E.2d 861 (1986); Appling v. State, 256 Ga. 36, 343 S.E.2d 684 (1986); Williams v. State, 178 Ga. App. 581, 344 S.E.2d 247 (1986); Gaskins v. State, 181 Ga. App. 849, 354 S.E.2d 27 (1987); Williamson v. State, 182 Ga. App. 49, 354 S.E.2d 868 (1987); Cunningham v. State, 182 Ga. App. 266, 355 S.E.2d 762 (1987); Louis v. State, 185 Ga. App. 472, 364 S.E.2d 607 (1988); Shirley v. State, 188 Ga. App. 357, 373 S.E.2d 257 (1988); Lane v. Taylor, 193 Ga. App. 777, 389 S.E.2d 26 (1989); United States Fid. & Guar. Co. v. State Farm Mut. Auto. Ins. Co., 195 Ga. App. 14, 392 S.E.2d 574 (1990); O'Kelly v. State, 196 Ga. App. 860, 397 S.E.2d 197 (1990); Walker v. State, 197 Ga. App. 265, 398 S.E.2d 217 (1990); Riggins v. State, 197 Ga. App. 612, 399 S.E.2d

General Consideration (Cont'd)

96 (1990); *Burke v. State*, 201 Ga. App. 50, 410 S.E.2d 164 (1991); *Trinity v. Applebee's Neighborhood Grill & Bar*, 201 Ga. App. 404, 411 S.E.2d 131 (1991); *Bean v. Landers*, 215 Ga. App. 366, 450 S.E.2d 699 (1994).

Transcript

Transcript not required where alleged error stems from pleadings. — Where error relied upon in motion for new trial is one that appears from pleadings no transcript or brief of evidence is required. *Hill v. General Rediscout Corp.*, 116 Ga. App. 459, 157 S.E.2d 888 (1967).

Where evidence is familiar, court may hear motion without transcript. — In court's discretion, if court is familiar with evidence, motion may be heard and if proper granted, although transcript is not physically available at time. *Castile v. Rich's, Inc.*, 131 Ga. App. 586, 206 S.E.2d 851 (1974).

No brief is required in connection with motion to set judgment aside since that goes to defects not amendable which appear on face of record or pleadings. *Hill v. General Rediscout Corp.*, 116 Ga. App. 459, 157 S.E.2d 888 (1967).

Within discretion of trial judge to set time for filing of transcript of evidence. There is nothing in section to indicate that judge must state his reasons for granting whatever length of time he determines is necessary for filing of transcript. He knows the volume of litigation in his court, and must be assumed to know whether court reporter is promptly and efficiently discharging his or her duties. *Diamond v. Liberty Nat'l Bank & Trust Co.*, 228 Ga. 533, 186 S.E.2d 741 (1972).

Movant's failure to make reasonable effort to secure transcript. — Where it appears that transcript of evidence, or lawful substitute therefor under this section is essential to consideration of grounds of motion for judgment n.o.v. or for new trial and neither was produced at time of hearing on motion, and judge found as a fact that movants had not made a reasonable effort to secure it, proper direction to give matter is to dismiss motion. *Miller v. Sparks*, 124 Ga. App. 4, 183 S.E.2d 88 (1971).

Where the defendants' motion for a new trial was dismissed not because the court reporter took longer than planned to pre-

pare the transcript, but because the defendants failed to either seek and obtain an extension of time for filing the transcript or ensure the transcript was filed there was no abuse of discretion by the court. *Myers v. Myers*, 195 Ga. App. 529, 394 S.E.2d 374 (1990).

Trial court has discretion to set the time for filing of the transcript of the evidence, and dismissal of a motion for new trial is appropriate when the transcript is necessary to consideration of the motion, and the movant has made no reasonable effort to secure it. *Moore v. Sinclair*, 196 Ga. App. 667, 396 S.E.2d 557 (1990).

Duty upon court reporter not upon litigant. — There is no duty on litigant to take recordings of evidence from reporter and have them transcribed by typists employed by litigant. In fact, such practice cannot be allowed. Reporter has duty to give correct report of proceedings on trial, and must certify to correctness of such transcript under § 5-6-41(e). *Diamond v. Liberty Nat'l Bank & Trust Co.*, 228 Ga. 533, 186 S.E.2d 741 (1972).

Motion

1. In General

Application for new trial is made only by filing motion for new trial. *Smith v. Forrester*, 145 Ga. App. 281, 243 S.E.2d 575, cert. denied, 439 U.S. 863, 99 S. Ct. 185, 58 L. Ed. 2d 172 (1978).

Proper, timely filing of notice of appeal is absolute requirement to confer jurisdiction upon appellate court. *Smith v. Forrester*, 145 Ga. App. 281, 243 S.E.2d 575, cert. denied, 439 U.S. 863, 99 S. Ct. 185, 58 L. Ed. 2d 172 (1978).

Place of filing. — Where paper is required to be filed, without more, this means filing in clerk's office. *Dukes v. Ralston Purina Co.*, 127 Ga. App. 696, 194 S.E.2d 630 (1972).

Merely sending motion to judge does not constitute making application within meaning of section. *Smith v. Forrester*, 145 Ga. App. 281, 243 S.E.2d 575, cert. denied, 439 U.S. 863, 99 S. Ct. 185, 58 L. Ed. 2d 172 (1978).

Strict pleading is required in extraordinary motions for new trial in order to postpone indefinitely the execution of the sentence and allow the judge to whom it is

presented to ascertain readily if a new trial is warranted based on newly discovered evidence. *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11 (1982).

Failure to state facts sufficient for grant of motion. — Where the pleadings in an extraordinary motion for new trial in a criminal case do not contain a statement of facts sufficient to authorize that the motion be granted, if the facts developed at the hearing warrant such relief, it is not error for the trial court to refuse to conduct a hearing on the extraordinary motion. *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11 (1982).

Delay in ruling on motion. — Trial court did not err in not vacating defendant's sentence merely because approximately two years passed between the jury verdict and the time the trial court overruled defendant's motion for new trial. *Lowry v. State*, 171 Ga. App. 118, 318 S.E.2d 744 (1984).

Court's own motion. — A trial court's order for a new trial made within 30 days of the entry of a judgment is valid under subsection (h) notwithstanding a reference to a prematurely filed motion for a new trial made by one of the parties. *Central of Ga. R.R. v. Hearn*, 188 Ga. App. 277, 372 S.E.2d 834 (1988).

Post notice of appeal. — The trial court may, on its own motion, grant a new trial as provided in subsection (h) within the time in which a motion for new trial may be filed even though a notice of appeal has been filed. *Griffin v. Loper*, 209 Ga. App. 504, 433 S.E.2d 653 (1993).

Concurrent pendency of appeal and new trial motion. — Where party who filed appeal subsequently makes a motion for a new trial, pendency of new trial motion does not divest appellate court of jurisdiction to hear appeal. *Atkinson v. State*, 170 Ga. App. 260, 316 S.E.2d 592 (1984).

Filing requirement waived. — Although no motion for new trial was filed, the lack of any opportunity for a hearing before the trial court required remanding the case for an evidentiary hearing on the issue of the asserted ineffectiveness of defendant's trial counsel. *Brady v. State*, 207 Ga. App. 451, 428 S.E.2d 373 (1993).

Motion for new trial is indispensable means for testing sufficiency of evidence. — Where case has been tried by jury and verdict rendered therein, and losing party

desires to test sufficiency of evidence to support verdict, motion for new trial is indispensable. *Nuckolls v. Jordan*, 49 Ga. App. 79, 174 S.E. 250 (1934) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

New trial is peculiar and appropriate remedy when losing party desires reexamination of facts. *Durrence v. Cowart*, 160 Ga. 671, 129 S.E. 26 (1925) (decided under former Civil Code 1910, § 6089).

Section deals with ordinary motions only, leaving others to be treated under § 6092 (see § 5-5-41). *Brinkley v. Buchanan*, 55 Ga. 342 (1875) (decided under former Code 1873, § 3719).

Word "made" as used in section is synonymous with "filed." *Hilt v. Young*, 116 Ga. 708, 43 S.E. 76 (1902) (decided under former Civil Code 1895, § 5484); *Peavy v. Peavy*, 167 Ga. 219, 145 S.E. 55 (1928) (decided under former Civil Code 1910, § 6089).

Certain motions to set aside judgment are treated as motions for new trial. — Motions to set aside judgment based on matters not appearing on face of record are governed by same rules of practice as motions for new trials. *Perry v. Maryland Cas. Co.*, 102 Ga. App. 475, 116 S.E.2d 620 (1960) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Motion for new trial must be filed with clerk of trial court. *Hilt v. Young*, 116 Ga. 708, 43 S.E. 76 (1902) (decided under former Civil Code 1895, § 5484).

Leaving motion in office of judge, under care of special bailiff, does not constitute filing. *New England Mtg. Sec. Co. v. Collins*, 115 Ga. 104, 41 S.E. 270 (1902) (decided under former Civil Code 1895, § 5484).

Special ground in motion for new trial must be complete within itself. — Grounds of motions for new trial not sufficiently complete within themselves, will not be passed upon. *Gibson v. State*, 77 Ga. App. 292, 48 S.E.2d 309 (1948) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Special grounds of motion for new trial must be complete and understandable within themselves without necessity of refer-

Motion (Cont'd)**1. In General (Cont'd)**

ence to other special grounds of motion, brief of evidence, or other parts of record to understand them. *Stanley v. Chitwood*, 87 Ga. App. 38, 73 S.E.2d 40 (1952) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16); *Fillingham v. Campbell*, 87 Ga. App. 481, 74 S.E.2d 392 (1953); *Hartsfield v. Hartsfield*, 87 Ga. App. 707, 75 S.E.2d 276 (1953) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Ground of motion requiring reference to other grounds or portions of record. — Ground of motion for new trial which requires reference to other grounds of motion or to portions of record for understanding thereof or to enable court to ascertain whether error alleged was in fact error is too incomplete to be considered. *Sutton v. Allen*, 87 Ga. App. 25, 72 S.E.2d 921 (1952) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Special grounds of amended motion for new trial which are incomplete within themselves, in that they require reference to record, fail to set up substance of testimony and documentary evidence objected to or fact of timely objection and grounds of objection urged, will not be passed upon by Court of Appeals. *Allison v. State*, 84 Ga. App. 77, 65 S.E.2d 642 (1951) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Reference in one special ground to brief of evidence for facts necessary to understand errors assigned is not permitted, and ground not complete and understandable within itself will not be passed upon by Court of Appeals. *Robertson v. Robertson*, 90 Ga. App. 576, 83 S.E.2d 619 (1954) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Where nonparty files motion in own name, name of real party cannot thereafter be substituted. — Where one not party to case files motion for new trial in his own name, motion cannot thereafter be amended so as

to substitute name of real party to case as movant. *Athens Truck & Tractor Co. v. Kennedy*, 91 Ga. App. 49, 84 S.E.2d 608 (1954) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Suits tried together, with different verdicts rendered. — In suit between different parties tried together wherein different verdicts and judgments were entered, it is not proper for single motion for new trial to be filed in name of both plaintiffs. *Allen v. Woods*, 44 Ga. App. 430, 161 S.E. 655 (1931) (decided under former Civil Code 1910, § 6089).

Second motion not authorized where first motion complaining of same verdict is pending. — Where motion for new trial is pending in superior court, there is no provision of law authorizing movant to file second separate original motion for new trial complaining of same verdict. *Perry v. Harper*, 190 Ga. 235, 9 S.E.2d 162 (1940) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

When motion for new trial permitted notwithstanding verdict has not been received or recorded. — Accused having procured decision that verdict which trial judge refused to receive was valid verdict and final determination of case, effect was that motion for new trial could have been filed, notwithstanding verdict had not been received and recorded. It was not error to refuse to entertain motion for new trial made a year after rendition of verdict. *Register v. State*, 12 Ga. App. 688, 78 S.E. 142 (1913) (decided under former Penal Code 1910, § 6089).

2. Time for Filing

Applications for new trial must be filed within 30 days from entry of judgment on verdict. *Joiner v. Perkerson*, 160 Ga. App. 343, 287 S.E.2d 327 (1981).

From entry of sentence upon convicted defendant. — Where trial court entered an order on August 29, 1985, the day the jury returned its verdicts, in which order it "considered, ordered, and adjudged that the defendant is guilty," but sentence was entered on October 21, 1985, and defendant filed a motion for new trial ten days later, it was held that the entry of sentence upon a convicted defendant is necessary for a final

judgment, from which an appeal may be taken, to be entered, and inasmuch as defendant's motion for new trial was filed within 30 days after his sentence was entered, it was timely and extended the time within which defendant had to file his appeal to the Court of Appeals. *Howard v. State*, 182 Ga. App. 403, 355 S.E.2d 772 (1987).

Burden is upon party desiring to take appeal to timely file motion. — Burden is upon party desiring to take appeal to file his motion for new trial or notice of appeal within required 30-day period; a party does not satisfy this burden by receiving assurances of clerk or by conferring with clerk as to speed of postal delivery. *H.R. Lee Inv. Corp. v. Groover*, 138 Ga. App. 231, 225 S.E.2d 742 (1976).

Good reason must be shown for failure to file motion within prescribed time. — In any case where motion for new trial is made more than 30 days after entry of judgment on verdict, some good reason must be shown why motion was not made within time allowed by law. *Brawner v. Wilkins*, 114 Ga. App. 263, 150 S.E.2d 721 (1966).

Date of entry of filing by clerk is presumed correct until rebutted. — Entry of filing by clerk is best evidence of date of filing and is presumed to be correct until contrary is shown. This presumption may be rebutted, however, by proof of delivery for filing to clerk on different day. *H.R. Lee Inv. Corp. v. Groover*, 138 Ga. App. 231, 225 S.E.2d 742 (1976).

Filing after time prescribed does not toll time for filing notice of appeal. — Where purported motion for new trial is not filed within 30 days as required by section, it is void and of no effect, and therefore does not toll time for filing notice of appeal under § 5-6-38. *Johnson v. State*, 227 Ga. 219, 180 S.E.2d 94 (1971).

An untimely motion for new trial is void and does not operate to toll the time for filing of the notice of appeal. *Wright v. Rhodes*, 198 Ga. App. 269, 401 S.E.2d 35 (1990).

Invitation by court, before verdict returned, to file motion. — Where, at the close of the defendant's evidence, the court volunteered that in its opinion there was a fatal variance between the allegata and probata on the criminal trespass charge and that if

the jury returned a verdict of guilty, the court would either "set that judgment aside" or "grant a motion for new trial instantly" if defendant requested one on that basis and, immediately following return of the verdicts, the court stated that it was granting "a new trial" on the criminal trespass charge, the court effectively acquitted defendant. Even if the order had been a proper grant of new trial, it would not have been appealable by the State, as it is not encompassed in § 5-7-1. *State v. Seignious*, 197 Ga. App. 766, 399 S.E.2d 559 (1990).

Motion for new trial filed before judgment is entered, is premature and invalid. Fact that trial judge announced orally that he would grant motion for new trial is no judgment. *Moore v. Moore*, 229 Ga. 600, 193 S.E.2d 608 (1972).

Motion for new trial made before judgment is entered is premature and not timely filed under this section. *Deroller v. Powell*, 144 Ga. App. 585, 241 S.E.2d 469 (1978).

Motion for new trial filed prior to entry of judgment is void. *Joiner v. Perkerson*, 160 Ga. App. 343, 287 S.E.2d 327 (1981).

After appeal. — Where motion for new trial was filed after case was on appeal, any attempted action by trial court was a nullity. *Jinks v. State*, 163 Ga. App. 841, 296 S.E.2d 624 (1982).

Lower court may not grant new trial after appellate review. — Where judgment was entered for the plaintiff, who then filed a notice of appeal, and the defendant then filed a cross appeal as well as a motion for new trial in the trial court, and the Court of Appeals then affirmed the trial court's judgment, the trial court could not reassert its jurisdiction and grant a new trial to the defendant. *Housing Auth. v. Van Geeter*, 252 Ga. 196, 312 S.E.2d 309 (1984).

Where the Court of Appeals had affirmed a lower court verdict and reversed the grant of a new trial by that court, a subsequent granting of a new trial by the lower court was error. *Sharif v. Tidwell Homes, Inc.*, 252 Ga. 205, 312 S.E.2d 114 (1984).

Extending time to file notice of appeal. — A timely notice of appeal must be filed after obtaining a proper written order from the trial court, however, the trial court cannot enter an order purporting to extend the time to file, until a notice of appeal has been filed. *Watson v. State*, 202 Ga. App. 667, 415 S.E.2d 306 (1992).

Motion (Cont'd)**2. Time for Filing (Cont'd)**

Motion for new trial may be made on same day as rendition of verdict. *Durrence v. Cowart*, 160 Ga. 671, 129 S.E. 26 (1925) (decided under former Civil Code 1910, § 6089).

Good reason must be shown to justify filing motion after time prescribed. — Motion for new trial made after time permitted by section may not be entertained unless some good reason be shown why motion was not made within time required, which reason shall be judged on by court. *Union Life Ins. Co. v. Aaronson*, 109 Ga. App. 384, 136 S.E.2d 142 (1964) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16.).

One failing to file motion in time cannot become party to motion filed by another. *Hill v. O'Bryan Bros.*, 104 Ga. 137, 30 S.E. 996 (1898) (decided under former Civil Code 1895 § 5484).

3. Amendment

Amendments to motion must be filed before court's ruling thereon. — Section clearly requires that amendments to motion for new trial must be filed prior to court's ruling thereon. *Arnold v. DeKalb County*, 141 Ga. App. 315, 233 S.E.2d 273 (1977).

Nunc pro tunc entry cannot be used to correct failure to make timely amendment. *Arnold v. DeKalb County*, 141 Ga. App. 315, 233 S.E.2d 273 (1977).

Party cannot amend motion after 30 days to move for judgment n.o.v. — Where party after suffering an adverse judgment filed only a motion for new trial within 30-day period specified in § 9-11-50, then after the 30-day period expired party sought to file, in the form of an amendment to the new trial motion, a motion for judgment notwithstanding the verdict, the latter motion must be considered invalid. *Preferred Risk Ins. Co. v. Boykin*, 174 Ga. App. 269, 329 S.E.2d 900, cert. denied, 254 Ga. 349, 331 S.E.2d 879 (1985).

Application

Challenge to charge to jury may be made on motion for new trial. *Thornton v.*

Stynchcombe, 323 F. Supp. 254 (N.D. Ga. 1971).

Section applies where verdict and judgment based on testimony of witness subsequently found guilty of perjury. *Windsor Forest, Inc. v. Rocker*, 121 Ga. App. 773, 175 S.E.2d 65 (1970).

Extraordinary motion for new trial still available remedy after dismissal. — After order of dismissal under § 9-11-41(b) extraordinary motions for new trial are still available procedures under this section and § 9-11-60(c), (f). *Vaughan v. Car Tapes, Inc.*, 135 Ga. App. 178, 217 S.E.2d 436 (1975).

Motion for new trial is inappropriate vehicle to obtain re-examination of grant of summary judgment and a motion so filed has no validity and will not extend filing date of notice of appeal. *Shine v. Sportservice Corp.*, 140 Ga. App. 355, 231 S.E.2d 130 (1976).

A motion for new trial is not the proper vehicle to obtain a reexamination of the legal conclusions solely involved in a grant of summary judgment. *Sands v. Lamar Properties, Inc.*, 159 Ga. App. 718, 285 S.E.2d 24 (1981).

Motion no longer prerequisite for trial court to set aside verdict and grant new trial. *Florida E. Coast Properties, Inc. v. Davis*, 133 Ga. App. 932, 213 S.E.2d 79 (1975).

Trial judge may grant new trial on own motion within prescribed time. — Trial judge is empowered on his own volition to correct any error subsequently recognized as to rulings during trial as well as to exercise his discretion as to weight of evidence and grant new trial on his own motion within 30 days from entry of judgment. *Hulsey v. Sears, Roebuck & Co.*, 138 Ga. App. 523, 226 S.E.2d 791 (1976).

Court granting own motion, on unspecified grounds, after time prescribed. — Court may not grant new trial on unspecified ground on its own motion after more than 30 days from entry of judgment and after term had expired. *Darby v. Commercial Bank*, 135 Ga. App. 462, 218 S.E.2d 252 (1975), overruled on other grounds, *Smith v. Telecable of Columbus, Inc.*, 140 Ga. App. 755, 232 S.E.2d 100 (1976).

Defendant must raise all issues on first and only appeal, for judgment on that appeal is conclusive of all issues raised or which could have been raised. *Akins v. State*, 237 Ga. 826, 229 S.E.2d 645 (1976).

Judge who cannot recollect evidence sufficiently to settle matter, shall enter order so stating. *Hill v. General Rediscount Corp.*, 116 Ga. App. 459, 157 S.E.2d 888 (1967).

Error to grant new trial where not elicited.

— Where no reading of defendant's motion could suggest an attempt by defendant to elicit such an order, it was error for the trial court to grant a new trial to plaintiff, especially where such an order could only benefit the plaintiff and work to the detriment of the defendant. *Nelson & Budd, Inc. v. Brunson*, 173 Ga. App. 856, 328 S.E.2d 746 (1985).

New trial motion proper means of attacking nominal damage award. — Award of \$130,000.00 nominal damages, if palpably unreasonable, excessive, or the product of bias, may be set aside, but these are not the criteria for a directed verdict or judgment n.o.v.; the motion for a new trial is the proper means of attack. *Miller & Meier & Assocs. v. Diedrich*, 174 Ga. App. 249, 329 S.E.2d 918, aff'd in part, rev'd in part, 254 Ga. 734, 334 S.E.2d 308 (1985).

Requirements for motion based on newly discovered evidence. — A movant's extraor-

dinary motion for a new trial based on recently discovered evidence must satisfy the court: (1) that newly discovered evidence has come to the movant's attention since his trial; (2) that want of due diligence was not the reason that his evidence was not acquired sooner; (3) that the evidence was so material that it would produce probably a different verdict; (4) that it was not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence is sufficiently explained; and (6) that the new evidence does not operate solely to impeach the credit of a witness. The motion must set forth facts to meet these requirements; conclusions of counsel will not suffice. *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11 (1982).

New trial motion based on new evidence directed first to trial court. — Supplemental brief on appeal containing an affidavit of a witness recanting his trial testimony was in substance an extraordinary motion for new trial based on newly discovered evidence and should have been directed to the trial court in the first instance. *Williams v. State*, 254 Ga. 6, 326 S.E.2d 444 (1985).

OPINIONS OF THE ATTORNEY GENERAL

Extraordinary motion for new trial may be filed at any time after conviction; extraordinary motion must show that there is some material matter which would have been beneficial to defendant at time of trial and that

such matters were unknown to defendant and could not have been discovered by him or his counsel by use of due diligence. 1957 Op. Att'y Gen. p. 69.

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 470-498.

C.J.S. — 66 C.J.S., New Trial, §§ 117-146.

ALR. — Inability to perfect record for appeal as ground for new trial, 16 ALR 1158; 107 ALR 603.

Motion for new trial as suspension or stay of execution or judgment, 121 ALR 686.

Right of trial court to grant new trial as affected by appellate proceedings, 139 ALR 340.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion, 23 ALR2d 852.

What constitutes final judgment within provision or rule limiting application for

new trial to specified period thereafter, 34 ALR2d 1181.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Successive actions as within statutory provision fixing time within which new action may be commenced after nonsuit or judgment not on merits, 54 ALR2d 1229.

Delay as affecting right to coram nobis attacking criminal conviction, 62 ALR2d 432.

Time for filing motion for new trial based on jury conduct occurring before, but discovered after, verdict, 97 ALR2d 788.

Amendment, after expiration of time for

filing motion for new trial in civil case, of motion made in due time, 69 ALR3d 845.

Amendment, after expiration of time for filing motion for new trial in criminal case, of motion made in due time, 69 ALR3d 933.

Appeal by state of order granting new trial in criminal case, 95 ALR3d 596.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 ALR4th 1049.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence — modern cases, 70 ALR4th 664.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

5-5-41. Requirements as to extraordinary motions for new trial generally; notice of filing of motion; limitations as to number of extraordinary motions in criminal cases.

(a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court. In all such cases, 20 days' notice shall be given to the opposite party.

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed. (Orig. Code 1863, § 3645; Code 1868, § 3670; Ga. L. 1873, p. 47, § 1; Code 1873, § 3721; Code 1882, § 3721; Civil Code 1895, § 5487; Penal Code 1895, § 1064; Civil Code 1910, § 6092; Penal Code 1910, § 1091; Code 1933, § 70-303.)

Cross references. — Granting of new trial based on newly discovered evidence, § 5-5-23. Extensions of time for filing of motions for new trial, § 9-11-6.

Law reviews. — For comment on Williams

v. Georgia, 24 U.S.L.W. 3191 (Jan. 17, 1956), discussing whether a challenge to the entire panel could be raised by an extraordinary motion for new trial, see 18 Ga. B.J. 350 (1956).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TRIAL COURT'S DISCRETION

EXTRAORDINARY MOTIONS BASED ON NEWLY DISCOVERED EVIDENCE

APPLICATION

1. IN GENERAL
2. WHEN EXTRAORDINARY MOTION PROPER
3. WHEN EXTRAORDINARY MOTION UNAVAILABLE

General Consideration

Extraordinary motions are authorized indirectly by this section and § 5-5-40. *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11 (1982).

Motion for new trial made more than 30 days after entry of judgment is an extraordinary motion. *Dyal v. State*, 121 Ga. App. 50, 172 S.E.2d 326 (1970).

Common law right. — Right to grant new trials upon extraordinary grounds was recognized at common law. *Hudgins v. Veal*, 98 Ga. 137, 26 S.E. 479 (1896).

Extraordinary motion for new trial is in nature of a bill in equity. *Bivins v. McDonald*, 50 Ga. App. 299, 177 S.E. 829 (1934).

Right to grant new trials upon extraordinary grounds was intended to replace bills in equity for new trials, and motion must state grounds upon which it is based. *East Tenn. v. & Ga. R.R. v. Whitlock*, 75 Ga. 77 (1885); *Cox v. State*, 19 Ga. App. 283, 91 S.E. 422 (1917).

Probate court cannot entertain motion. — Only superior and city courts may grant new trials, and court of ordinary (now probate court) has no jurisdiction to entertain motion or extraordinary motion for new trial. *Byrd v. Riggs*, 210 Ga. 473, 80 S.E.2d 785 (1954).

The bases for granting an extraordinary motion are much stricter than a normal motion. *Gordon v. State*, 193 Ga. App. 94, 387 S.E.2d 40 (1989).

Good reason must be shown to justify motion made after time prescribed. — Motion for new trial made after time permitted by § 5-5-40 may not be entertained unless some good reason be shown why motion was not made within time required, which reason shall be judged of by court. *Union Life Ins. Co. v. Aaronson*, 109 Ga. App. 384, 136 S.E.2d 142 (1964).

In any case where motion for new trial is made more than 30 days after entry of judgment on verdict, some good reason must be shown why motion was not made within time allowed by law. *Brawner v. Wilkins*, 114 Ga. App. 263, 150 S.E.2d 721 (1966).

Extraordinary motions for new trial are not favored by courts. *Hays v. Westbrook*, 96 Ga. 219, 22 S.E. 893 (1895); *Baskin v. State*, 43 Ga. App. 760, 160 S.E. 539 (1931); *Allen v. State*, 88 Ga. App. 200, 76 S.E.2d 531 (1953); *Cade v. State*, 107 Ga. App. 30, 129

S.E.2d 405 (1962); *Patterson v. State*, 228 Ga. 389, 185 S.E.2d 762 (1971).

Extraordinary motion for new trial is not favored, and stands upon different footing from original motion for new trial. *Loomis v. Edwards*, 80 Ga. App. 396, 56 S.E.2d 183 (1949), cert. denied, 339 U.S. 970, 70 S. Ct. 989, 94 L. Ed. 1377 (1950).

Motions for new trial after verdict are not favored, and extraordinary motions for new trial after final judgment are favored even less. *Williams v. Georgia*, 349 U.S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955), cert. denied, 350 U.S. 950, 76 S. Ct. 326, 100 L. Ed. 828 (1956).

Extraordinary motion for new trial institutes an entirely new case, requiring discretionary action on part of judge having jurisdiction thereof to bring it into actual existence as a cause in the courts. *Bivins v. McDonald*, 50 Ga. App. 299, 177 S.E. 829 (1934).

Motion does not lie to correct errors in judgments or decrees. — If plaintiff in error relies on so-called extraordinary motion for new trial as proper procedure to vacate and set aside existing judgments, he is confronted with the rule that motion for new trial is not proper remedy to correct alleged error in any judgment or decree entered by trial court and his motion will be denied. *Ballard v. Harmon*, 202 Ga. 603, 44 S.E.2d 260 (1947).

Right to extraordinary motion not affected by appellate court decision on grounds of previous motion. — Any rights that movant has to proceed in trial of extraordinary motion for new trial are not lost by decision of appellate court as to grounds set forth in previous motion for new trial. *Williams v. Pilcher & Dillon*, 31 Ga. App. 591, 121 S.E. 581 (1924).

Exceptions to rule barring second appeal where conviction affirmed. — Two exceptions to the general rule that when a judgment of conviction is affirmed by an appellate court, no ordinary second appeal will be allowed are an extraordinary motion for new trial and habeas corpus. *Grant v. State*, 159 Ga. App. 2, 282 S.E.2d 668 (1981).

Strict pleading is required in extraordinary motions for new trial in order to postpone indefinitely the execution of the sentence and allow the judge to whom it is presented to ascertain readily if a new trial is

General Consideration (Cont'd)

warranted based on newly discovered evidence. *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11 (1982).

Hearing required. — Under this section and § 5-5-40, the trial court is required to hold a hearing on a motion for new trial. *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11 (1982).

No hearing where motion shows no merit. — An extraordinary motion for new trial which fails to show any merit may be denied without the necessity of a hearing. *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11 (1982).

Failure to state facts sufficient for grant of motion. — Where the pleadings in an extraordinary motion for new trial in a criminal case do not contain a statement of facts sufficient to authorize that the motion be granted if the facts developed at the hearing warrant such relief, it is not error for the trial court to refuse to conduct a hearing on the extraordinary motion. *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11 (1982).

"Good reason" for motion. — Normally, the "good reason" necessary to permit the filing of an extraordinary motion for a new trial consists of newly discovered evidence, but the late filing of a motion for a new trial may also be predicated on circumstances other than newly discovered evidence. *Martin v. Children's Sesame, Inc.*, 188 Ga. App. 242, 372 S.E.2d 648 (1988).

The trial court did not abuse its discretion in concluding that the late filing of a motion was supported by "good reason" where the clerk's office incorrectly informed the movants of the filing date on two occasions and where the motion would have been timely had the clerk's representations been correct. *Martin v. Children's Sesame, Inc.*, 188 Ga. App. 242, 372 S.E.2d 648 (1988).

Showing of good defense required. — Both an extraordinary motion for new trial and a complaint in equity require the petitioner's showing that he has a good defense to the action at law. *Saxon v. Covington*, 178 Ga. App. 271, 342 S.E.2d 754 (1986).

Summary denial of motion constitutional where movant fails to follow procedure. — Due process and equal protection rights are not violated by a trial court's summary denial of a movant's extraordinary motion for new trial when he fails to comply with the

procedural requirements of state law. *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11 (1982).

Cited in *Doyal v. State*, 73 Ga. 72 (1884); *Fambles v. State*, 97 Ga. 625, 25 S.E. 365 (1896); *Collier v. State*, 115 Ga. 17, 41 S.E. 261 (1902); *Perkins v. State*, 126 Ga. 578, 55 S.E. 501 (1906); *Brown v. State*, 141 Ga. 783, 82 S.E. 238 (1914); *Crawley v. State*, 151 Ga. 818, 108 S.E. 238, 18 A.L.R. 368 (1921); *Donalson v. Bank of Jakin*, 33 Ga. App. 428, 127 S.E. 229 (1925); *Coggeshall v. Park*, 162 Ga. 78, 132 S.E. 632 (1926); *Federal Inv. Co. v. Ewing*, 166 Ga. 246, 142 S.E. 890 (1928); *Hiott v. Hiott*, 173 Ga. 392, 160 S.E. 500 (1931); *State Bd. of Penal Cors. v. Johnson*, 190 Ga. 246, 9 S.E.2d 251 (1940); *Miles v. Johnson*, 193 Ga. 492, 18 S.E.2d 831 (1942); *Crenshaw v. Crenshaw*, 198 Ga. 536, 32 S.E.2d 177 (1944); *Randall v. Whitman*, 88 Ga. App. 803, 78 S.E.2d 78 (1953); *Fields v. Balkcom*, 211 Ga. 797, 89 S.E.2d 189 (1955); *Fulton v. Chattanooga Publishing Co.*, 100 Ga. App. 573, 112 S.E.2d 15 (1959); *McRae v. State*, 116 Ga. App. 407, 157 S.E.2d 646 (1967); *Harris v. State*, 225 Ga. 458, 169 S.E.2d 331 (1969); *Hilliard v. State*, 128 Ga. App. 157, 195 S.E.2d 772 (1973); *Akins v. State*, 237 Ga. 826, 229 S.E.2d 645 (1976); *Martin v. State*, 240 Ga. 488, 241 S.E.2d 246 (1978); *Parker v. State*, 151 Ga. App. 139, 259 S.E.2d 145 (1979); *Collier v. State*, 169 Ga. App. 69, 311 S.E.2d 242 (1983); *Llewellyn v. State*, 252 Ga. 426, 314 S.E.2d 227 (1984); *Levitt v. State*, 170 Ga. App. 32, 316 S.E.2d 6 (1984); *Batson v. First Nat'l Bank*, 170 Ga. App. 803, 318 S.E.2d 227 (1984); *Knox v. State*, 180 Ga. App. 564, 349 S.E.2d 753 (1986); *Kindle v. State*, 181 Ga. App. 52, 351 S.E.2d 461 (1986); *Pittman v. State*, 183 Ga. App. 12, 357 S.E.2d 855 (1987); *Sharp v. State*, 183 Ga. App. 641, 360 S.E.2d 50 (1987); *White v. Fidelity Nat'l Bank*, 188 Ga. App. 539, 373 S.E.2d 640 (1988); *Cook v. Jordan Bradley Supply Co.*, 195 Ga. App. 604, 394 S.E.2d 400 (1990); *Department of Human Resources v. Browning*, 210 Ga. App. 546, 436 S.E.2d 742 (1993).

Trial Court's Discretion

Passing on extraordinary motion for new trial rests largely within discretion of trial judge. *Pulliam v. State*, 199 Ga. 709, 35 S.E.2d 250 (1945); *Gilpin v. Swainsboro Ice & Fuel Co.*, 75 Ga. App. 574, 44 S.E.2d 168

(1947); *Allen v. State*, 88 Ga. App. 200, 76 S.E.2d 531 (1953); *Williams v. Georgia*, 349 U.S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955), cert. denied, 350 U.S. 950, 76 S. Ct. 326, 100 L. Ed. 828 (1956).

Discretion of judge is not unlike that exercised in motions under § 5-5-40, and this discretion must be exercised as to whether good reason is shown why motion was not made during term. *Slusser v. Williams*, 100 Ga. App. 599, 112 S.E.2d 7 (1959).

Refusal of extraordinary motion for new trial not disturbed absent manifest abuse of discretion. *Dixon v. Mutual Life Indus. Ass'n*, 3 Ga. App. 524, 60 S.E. 207 (1908); *Pulliam v. State*, 199 Ga. 709, 35 S.E.2d 250 (1945); *Gilpin v. Swainsboro Ice & Fuel Co.*, 75 Ga. App. 574, 44 S.E.2d 168 (1947); *Allen v. State*, 88 Ga. App. 200, 76 S.E.2d 531 (1953); *Williams v. Georgia*, 349 U.S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955), cert. denied, 350 U.S. 950, 76 S. Ct. 326, 100 L. Ed. 828 (1956); *Cade v. State*, 107 Ga. App. 30, 129 S.E.2d 405 (1962).

Appellate court will remand case where trial judge failed to exercise discretion regarding extraordinary motion. *Central of Ga. Ry. v. O'Kelley*, 16 Ga. App. 594, 85 S.E. 938 (1915).

Trial judge acts as trier of fact in passing upon grounds of motion. — When trial judge passes upon grounds of extraordinary motion for new trial, he occupies position of trier of fact. *Cade v. State*, 107 Ga. App. 30, 129 S.E.2d 405 (1962).

Trial judge occupies position of trier when passing upon ground of extraordinary motion for new trial in criminal case, based upon alleged bias of a juror; his finding that juror was impartial will not be reversed, unless it is apparent that he has abused discretion which law vests in him in such cases. *Allen v. State*, 88 Ga. App. 200, 76 S.E.2d 531 (1953).

Where verdict is attacked in motion for new trial because of prejudice of juror, and issue is formed by evidence introduced by parties upon motion, judge is trier, and, unless there is abuse of discretion, his finding against movant and in favor of impartiality of juror is to be treated as final. *Baskin v. State*, 43 Ga. App. 760, 160 S.E. 539 (1931).

Whole record may be looked into in determining whether motion is meritorious. — While extraordinary motion is a new case,

whole record, including extraordinary motion, may be looked into to determine whether extraordinary motion is meritorious; if from such examination of record trial judge as a matter of law determines that extraordinary motion is without merit, he may decline to entertain it and is not compelled, as a matter of law, to issue a rule nisi thereon. *Loomis v. Edwards*, 80 Ga. App. 396, 56 S.E.2d 183 (1949), cert. denied, 339 U.S. 970, 70 S. Ct. 989, 94 L. Ed. 1377 (1950).

Judge has discretion to hear affidavits or oral testimony. — In hearing on extraordinary motion for new trial, where witnesses are present, and do not object, presiding judge has discretion as to whether he will hear affidavits or oral testimony. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Judge may admit, over objection, pertinent evidence. — It is not error on hearing of extraordinary motion for new trial to admit, over objection, record of evidence taken at main trial bearing upon question to be decided. *Herrin v. State*, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Extraordinary Motions Based on Newly Discovered Evidence

Extraordinary motion for new trial may be based upon newly discovered evidence. *Central of Ga. Ry. v. O'Kelley*, 16 Ga. App. 594, 85 S.E. 938 (1915).

Section provides for extraordinary motions for new trial based on newly discovered evidence. *Stembridge v. State*, 84 Ga. App. 413, 65 S.E.2d 819 (1951), cert. dismissed, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952).

Procedure for securing new trial because of newly discovered evidence is motion for new trial made according to this section. *Evans v. Perkins*, 225 Ga. 48, 165 S.E.2d 652 (1969).

Trial judge possesses wide discretion in passing on extraordinary motions based on newly discovered evidence. *Frank v. State*, 142 Ga. 617, 83 S.E. 233 (1914); *Fulford v. State*, 222 Ga. 846, 152 S.E.2d 845 (1967).

Standard of review. — Judgments on extraordinary motions based on newly discovered evidence are not disturbed absent abuse of discretion. *Frank v. State*, 142 Ga. 617, 83 S.E. 233 (1914); *Fulford v. State*, 222 Ga. 846, 152 S.E.2d 845 (1967).

Extraordinary Motions Based on Newly Discovered Evidence (Cont'd)

Extraordinary motions for new trial based on newly discovered evidence are not favored by law. *Dyal v. State*, 121 Ga. App. 50, 172 S.E.2d 326 (1970).

Regarding newly discovered evidence, stricter rule is applied to extraordinary motions than to ordinary motions based upon such ground. *Norman v. Goode*, 121 Ga. 449, 49 S.E. 268 (1904); *Jackson v. Williams*, 149 Ga. 505, 101 S.E. 116 (1919); *Reed Oil Co. v. Harrison*, 26 Ga. App. 37, 105 S.E. 496 (1920); *Baskin v. State*, 43 Ga. App. 760, 160 S.E. 539 (1931); *Gilpin v. Swainsboro Ice & Fuel Co.*, 75 Ga. App. 574, 44 S.E.2d 168 (1947).

Nature of new evidence. — Trial judge, in passing on extraordinary motion for new trial, must determine whether evidence would likely produce different result upon another trial and whether facts could have been obtained before verdict by exercise of ordinary diligence. *Bradley v. Bradley*, 232 Ga. 717, 208 S.E.2d 817 (1974).

After one accused of crime has been convicted, and has made motion for new trial, and judgment denying it has been affirmed by Supreme Court, when extraordinary motion for new trial is made, based on ground of newly discovered evidence, it should be made to appear that such evidence is so material that it would probably produce a different verdict. *Brannon v. State*, 190 Ga. 203, 9 S.E.2d 152 (1940).

Will discovered subsequent to judgment probating another will. — Petition to court of ordinary (now probate court) to set aside its judgment probating will in solemn form on ground that later will has been discovered since rendition of judgment, is analogous to but is not an extraordinary motion for new trial upon ground of newly discovered evidence. *Byrd v. Riggs*, 210 Ga. 473, 80 S.E.2d 785 (1954).

Hearing motion requires transcript or brief of evidence. — In order for extraordinary motion for new trial on ground of newly discovered evidence to be a valid motion, it must appear that newly discovered evidence is not merely cumulative or impeaching, and that it would likely produce a different result. None of these requirements can be determined without examination of

evidence adduced upon original trial of case. Absent either transcript or brief of evidence adduced at original trial, court cannot make determination it is required to make by referring to only part of evidence. *Dyal v. State*, 121 Ga. App. 50, 172 S.E.2d 326 (1970).

Requirements for motion. — A movant's extraordinary motion for a new trial based on recently discovered evidence must satisfy the court: (1) that newly discovered evidence has come to the movant's attention since his trial; (2) that want of due diligence was not the reason that his evidence was not acquired sooner; (3) that the evidence was so material that it would produce probably a different verdict; (4) that it was not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence is sufficiently explained; and (6) that the new evidence does not operate solely to impeach the credit of a witness. The motion must set forth facts to meet these requirements; conclusions of counsel will not suffice. *Dick v. State*, 248 Ga. 898, 287 S.E.2d 11 (1982).

Application

1. In General

Extraordinary motions are contemplated for events not ordinarily occurring in transaction of human affairs. *Cade v. State*, 107 Ga. App. 30, 129 S.E.2d 405 (1962).

Extraordinary cases contemplated by section are those arising from some providential cause. *Cox v. Hillyer*, 65 Ga. 57 (1880); *Harris v. Roan*, 119 Ga. 379, 46 S.E. 433 (1904).

Types of fact situations contemplated by section. — Cases contemplated by section are such as do not ordinarily occur in transaction of human affairs, as when a man has been convicted of murder, and it afterwards turns out that the man he was charged with having killed is still alive, or where a man has been convicted on testimony of witness who is afterwards found guilty of perjury in giving that testimony, or from some providential cause, and cases of like character. *Patterson v. State*, 228 Ga. 389, 185 S.E.2d 762 (1971).

Defects which occur in trial of defendant should be taken advantage of by ordinary motion for new trial, timely filed, unless good cause is shown for failure to file motion

within time provided by law. *Cade v. State*, 107 Ga. App. 30, 129 S.E.2d 405 (1962).

Witnesses present at trial cannot be basis of motion. — Extraordinary motion for new trial on ground of newly discovered evidence is properly refused, if it appears that witnesses whose evidence is alleged to have been newly discovered were subpoenaed by defendant, were in attendance upon court, and were not sworn by him. *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932).

Section does not authorize second motion where first motion complaining of same verdict is pending. — Where motion for new trial is pending in superior court, there is no provision of law authorizing movant to file second separate original motion for new trial complaining of same verdict, nor would instance of that character be comprehended by this section. *Harper v. Perry*, 190 Ga. 233, 9 S.E.2d 160 (1940).

Showing required in extraordinary motion alleging invalidity of insurance policies used to establish homicide motive. — Where irrespective of whether insurance policies, which were used by state to establish motive for murder, were valid or invalid, in extraordinary motion for new trial based on newly discovered evidence, no new evidence is produced which would establish that accused was aware at time of homicide that policies were invalid, motion should be overruled. *Pulliam v. State*, 199 Ga. 709, 35 S.E.2d 250 (1945).

Denial of extraordinary motion to set aside divorce decree precludes subsequent equitable petition on same grounds. — Where, after final verdict and decree for divorce, extraordinary motion for new trial is denied on merits of grounds, under conflicting evidence, such judgment precludes movant from maintaining subsequent equitable petition between same parties to set aside decree, based on substantially same grounds as those contained in former motion. *Sumner v. Sumner*, 186 Ga. 390, 197 S.E. 833 (1938).

Motion will be dismissed where diligence of movant is not shown. *Patterson v. Collier*, 77 Ga. 292, 3 S.E. 119 (1886); *Jackson v. Williams*, 149 Ga. 505, 101 S.E. 116 (1919); *Edenfield v. Youmans*, 33 Ga. App. 430, 126 S.E. 908 (1925).

2. When Extraordinary Motion Proper

Relationship of juror to prosecutor within prohibited degree is ground for extraordinary motion under section. *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932).

Disqualifying relationship of juror to party may justify extraordinary motion for new trial. *Edenfield v. Youmans*, 33 Ga. App. 430, 126 S.E. 908 (1925).

Improper communication with jury may serve as a ground for granting an extraordinary motion for a new trial. *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932).

Withdrawal by state appointed attorney of motion for new trial justified subsequent extraordinary motion. *Jackson v. Clark*, 52 Ga. 53 (1874).

Defendant had excuse for delay in filing motion for new trial so as to authorize trial court to entertain and hear such motion. See *Jones v. Cooke*, 169 Ga. App. 516, 313 S.E.2d 773 (1984).

Supplemental brief on appeal containing affidavit of a witness recanting his trial testimony was in substance an extraordinary motion for new trial based on newly discovered evidence and should have been directed to the trial court in the first instance. *Williams v. State*, 254 Ga. 6, 326 S.E.2d 444 (1985).

3. When Extraordinary Motion Unavailable

Matters known or discoverable prior to original motion. — Extraordinary motions for new trial cannot be based upon matters that were known to movant in time to have had them stated in original motion, or that could have been discovered in time by proper diligence. *Allen v. State*, 88 Ga. App. 200, 76 S.E.2d 531 (1953); *Barfield v. McEntyre*, 136 Ga. App. 294, 221 S.E.2d 58 (1975).

State of facts underlying extraordinary motion must have been unknown to movant or his counsel at time when ordinary motion for new trial could have been filed, and must have been impossible to ascertain by exercise of proper diligence for that purpose. *Gilpin v. Swainsboro Ice & Fuel Co.*, 75 Ga. App. 574, 44 S.E.2d 168 (1947); *Cade v. State*, 107 Ga. App. 30, 129 S.E.2d 405 (1962); *Patterson v. State*, 228 Ga. 389, 185 S.E.2d 762 (1971).

Application (Cont'd)**3. When Extraordinary Motion****Unavailable (Cont'd)**

Matter which could have been subject of original motion cannot be subject of extraordinary motion. *Barfield v. McEntyre*, 136 Ga. App. 294, 221 S.E.2d 58 (1975).

Errors known at time of direct appeal. —

Where absence of transcript of prosecutor's closing arguments was a matter known to defense counsel at time of defendant's direct appeal, all alleged errors premised upon absence of that transcript should have been enumerated in that appeal and cannot now be raised by extraordinary motion for new trial. *Blake v. State*, 244 Ga. 466, 260 S.E.2d 876 (1979), cert. denied, 446 U.S. 988, 100 S. Ct. 2974, 64 L. Ed. 2d 846 (1980).

Any errors regarding defendant's competence to stand trial and relating to whether charge of court was impermissibly burden-shifting could and should have been raised in his direct appeal and cannot now

be raised by vehicle of extraordinary motion for new trial. *Dix v. State*, 244 Ga. 464, 260 S.E.2d 863 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980).

Reviewing grounds of ordinary motion filed after prescribed time. — Where denial of motion for new trial is affirmed, either on merits or from lack of jurisdiction due to failure to file within time allowed by statute for review, extraordinary motion for new trial will not lie to review any grounds in original motion even though some such grounds may be meritorious. *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932).

Motion based on sufficiency of evidence.

— The sufficiency of the evidence is not a sufficiently good reason to grant an extraordinary motion for new trial. *Franz v. State*, 208 Ga. App. 677, 432 S.E.2d 554 (1993).

Mistake in naming parties in a motion is not grounds for extraordinary motion for new trial. *Southwestern R.R. v. Craig*, 62 Ga. 361 (1879).

OPINIONS OF THE ATTORNEY GENERAL

Extraordinary motion for new trial may be filed at any time after conviction; extraordinary motion must show that there is some material matter which would have been beneficial to defendant at time of trial and that

such matters were unknown to defendant and could not have been discovered by him or his counsel by use of due diligence. 1957 Op. Att'y Gen. p. 69.

RESEARCH REFERENCES

C.J.S. — 66 C.J.S., New Trial, §§ 226-232.

ALR. — Bill of review as the proper remedy where decree is entered after the death of a party, 6 ALR 1524.

Delay as affecting right to coram nobis

attacking criminal conviction, 62 ALR2d 432.

Time for filing motion for new trial based on jury conduct occurring before, but discovered after, verdict, 97 ALR2d 788.

5-5-42. Form for motion for new trial.

(a) The form for motion for new trial in civil cases prescribed in subsection (b) of this Code section shall be sufficient, but any other form substantially complying therewith shall also be sufficient.

(b) Form for motion for new trial in civil cases:

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiff)	
)	
v.)	Civil Action
)	File no. _____
_____)	
Defendant)	
)	

MOTION FOR NEW TRIAL

Defendant moves the court to set aside the verdict returned herein on _____, 19_____, and the judgment entered thereon on _____, 19_____, and to grant a new trial on the following grounds:

- (1) The verdict is contrary to law.
- (2) The verdict is contrary to the evidence.
- (3) The verdict is strongly against the weight of the evidence.
- (4) The court erred in permitting witness Smith to testify as follows:
_____.
- (5) The court erred in failing to charge the jury on unavoidable accident as requested in writing by defendant.
- (6) The court erred in charging the jury as follows: _____.

Dated: _____, 19_____.

Attorney for defendant

Address

(Here set forth rule nisi and certificate of service.)

- (c) The form for motion for new trial in criminal cases in subsection (d) of this Code section is declared to be sufficient but any other form substantially complying therewith shall also be sufficient.
- (d) Form for motion for new trial in criminal cases:

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

The State

v.

Defendant

)
)
)
)
)
)
)

Indictment

Accusation

File no. _____

MOTION FOR NEW TRIAL

Defendant moves the court to set aside the verdict returned herein on _____, 19____, and the sentence entered thereon on _____, 19____, and to grant a new trial on the following grounds:

- (1) The defendant should be acquitted and discharged due to the state's failure to prove guilt beyond a reasonable doubt.
- (2) Although the state proved the defendant's guilt beyond a reasonable doubt, the evidence was sufficiently close to warrant the trial judge to exercise his discretion to grant the defendant a retrial.
- (3) The court committed an error of law warranting a new trial.

Dated: _____, 19____.

Attorney for defendant

Address

(Here set forth rule nisi and certificate of service.)

(Ga. L. 1965, p. 18, § 20; Ga. L. 1983, p. 702, § 1; Ga. L. 1984, p. 22, § 5.)

Cross references. — Form of motion to dismiss, presenting defense of failure to state a claim, § 9-11-119.

Code Commission notes. — Grounds (4) through (6), above, would usually appear in

the amendment to the motion. They are shown here merely for illustration.

Law reviews. — For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966).

JUDICIAL DECISIONS

Testimony objected to must be identified in motion. — While requirements for contents of amended ground of motion for new trial have been relaxed, this section still requires that testimony objected to be identified. *Carroll v. Morrison*, 116 Ga. App. 575, 158 S.E.2d 480 (1967).

Motion otherwise correct not void for

failure to specify date of judgment. — Motion for new trial that shows style and number of case, and court in which it is pending is not void for not specifying date of judgment to be set aside. *Berman v. Berman*, 231 Ga. 216, 200 S.E.2d 870 (1973).

Subsection (d) not admission of guilt. — Trial court erred in denying defendant's

request for discharge and acquittal due to the state's failure to prove guilt beyond a reasonable doubt where the trial court perceived subsection (d)(2) to be an admission that the state had proved guilt beyond a reasonable doubt, and under modern rules of alternative pleading the inconsistent

grounds in defendant's motion should not have been used as admissions against him. *Hilson v. State*, 204 Ga. App. 200, 418 S.E.2d 784 (1992).

Cited in *Millhollan v. Watkins Motor Lines*, 116 Ga. App. 452, 157 S.E.2d 901 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 494.

ALR. — Necessity and propriety of

counteraffidavits in opposition to motion for new trial in civil case, 7 ALR3d 1000.

5-5-43. Allowance of filing of motion by judge other than trial judge.

A judge who did not try the case may, if presented with a motion for new trial within 30 days from the date of the verdict or judgment sought to be set aside, allow the filing of, issue rule nisi thereon, and decide the motion either where he is presiding in the court in which the trial was had, or where he is named in the rule, or where he is otherwise authorized by law to do so. (Code 1863, § 3644; Code 1868, § 3669; Code 1873, § 3720; Code 1882, § 3720; Civil Code 1895, § 5486; Civil Code 1910, § 6091; Code 1933, § 70-103; Ga. L. 1957, p. 224, § 13.)

History of section. — This section is derived from the decision in *Field v. Thornton*, 1 Ga. 306 (1846).

Law reviews. — For article, "A Discussion

of the 1957 Amendments to Rules of Practice and Procedure in Georgia," see 19 Ga. B.J. 395 (1957).

JUDICIAL DECISIONS

Death of presiding judge before motion is heard does not automatically require new trial. However, language used in overruling motion will be scrutinized to determine if successor shows that judge, in overruling it, did not exercise any discretion in reviewing verdict. *Town of Woodland v. Carter Constr. Co.*, 65 Ga. App. 547, 16 S.E.2d 129 (1941).

When presiding judge dies pending motion for new trial, his successor must hear and determine it. *Town of Woodland v. Carter Constr. Co.*, 65 Ga. App. 547, 16 S.E.2d 129 (1941).

Judge acting in another's place cannot grant continuance of motion ordered tried in another county. *Brantley v. Hass*, 69 Ga. 748 (1882).

As to approval of amendments. — See *Watkins v. Paine*, 57 Ga. 50 (1876); *Central R.R. & Banking Co. v. Pool*, 95 Ga. 410, 22 S.E. 631 (1895).

Cited in *Fletcher v. Gillespie*, 201 Ga. 377, 40 S.E.2d 45 (1946); *Wallace v. Speed*, 93 Ga. App. 120, 91 S.E.2d 53 (1955); *Golden v. Credico, Inc.*, 124 Ga. App. 700, 185 S.E.2d 578 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 202.

C.J.S. — 66 C.J.S., New Trial, §§ 135-138.

ALR. — Power of successor or substituted

judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 22 ALR3d 922.

5-5-44. Service of rule nisi; filing and recordation of motion.

In all motions for a new trial the opposite party shall be served with a copy of the rule nisi unless such copy is waived. The clerks of the courts shall not be required, except by order of the presiding judge, to enter upon the minutes of the courts motions for new trial in cases tried therein; but the motions shall be filed in the clerk's office as are other papers and shall be recorded together with the other pleadings in the cases when the same are finally disposed of as required by law. (Orig. Code 1863, § 3648; Code 1868, § 3673; Code 1873, § 3723; Ga. L. 1878-79, p. 138, § 1; Code 1882, § 3723; Civil Code 1895, § 5475; Penal Code 1895, § 1065; Civil Code 1910, § 6080; Penal Code 1910, § 1092; Code 1933, § 70-306.)

Law reviews. — For articles discussing the preparation of an amended motion for new trial and facts concerning appellate practice

in general, prior to the adoption of the Appellate Practice Act, see 21 Ga. B.J. 424 (1959).

JUDICIAL DECISIONS**ANALYSIS****GENERAL CONSIDERATION****FILING OF MOTION****METHOD OF SERVICE****TIME FOR SERVICE****PERSONS ENTITLED TO SERVICE****WAIVER OF SERVICE****DISMISSAL OF MOTION****General Consideration**

Section refers to motions filed under § 5-5-40. Smedley v. Williams, 112 Ga. 114, 37 S.E. 111 (1900); Gould v. C.B. Johnston & Co., 123 Ga. 765, 51 S.E. 608 (1905).

First sentence of section changed common law rule, by requiring service of copy of rule nisi for new trial. Lee v. Cox, 15 Ga. App. 249, 82 S.E. 941 (1914).

Where there is no service of process or waiver thereof, court is without jurisdiction and its judgment is void, not merely voidable, and may be attacked in any court where such judgment is attempted to be enforced. Dunn v. Dunn, 221 Ga. 368, 144 S.E.2d 758 (1965).

Service of rule nisi is required in criminal cases. Jackson v. State, 24 Ga. App. 594, 101 S.E. 710 (1919).

Presentation of motion, together with rule nisi issued thereon, is an ex parte hearing. King v. Sears, 91 Ga. 577, 18 S.E. 830 (1893); Gainesville Buggy & Wagon Co. v. Morrow, 23 Ga. App. 268, 98 S.E. 100 (1919).

Motion for continuance may be refused.

Tyler & Tomlinson v. Arnett, 13 Ga. App. 595, 79 S.E. 482 (1913).

Cited in McMullen v. Citizens Bank, 123 Ga. 400, 51 S.E. 342 (1905); Connor v. State, 7 Ga. App. 83, 66 S.E. 482 (1909); Whitaker v. State, 138 Ga. 139, 75 S.E. 254 (1912); Davis v. Harden, 143 Ga. 98, 84 S.E. 426 (1915); Harvey v. State, 16 Ga. App. 252, 85 S.E. 82 (1915); Louisville & N.R.R. v. Nelson, 145 Ga. 89, 88 S.E. 544 (1916); Automobile Ins. Co. v. Watson, 39 Ga. App. 244, 146 S.E. 922 (1929); Groves v. Groves, 177 Ga. 768, 171 S.E. 261 (1933); Petty v. Complete Auto Transit, Inc., 215 Ga. 66, 108 S.E.2d 697 (1959); Brown v. Brown, 233 Ga. 581, 212 S.E.2d 378 (1975); Vaughn v. State, 161 Ga. App. 265, 287 S.E.2d 728 (1982).

Filing of Motion

Filing in clerk's office required. — It is essential for validity of motion that it be filed in clerk's office and until it is so filed it is a mere private paper. Acknowledgment of ser-

vice of such private paper, purporting to be motion for new trial, is a mere nullity, and service as required by section is not perfected. *Atlantic Coast Line R.R. v. McNair*, 96 Ga. App. 519, 100 S.E.2d 639 (1957).

When motion has been delivered to clerk for filing, it is deemed filed, even though that officer fails to make proper entry of filing thereon. *Brinson v. Georgia R.R. Bank & Trust Co.*, 45 Ga. App. 459, 165 S.E. 321 (1932).

Judge may hand papers to clerk to be filed. *Sanders v. Williams*, 73 Ga. 119 (1884).

Method of Service

Section provides for necessity, not method, of service. *Short v. Riles*, 141 Ga. App. 881, 234 S.E.2d 710 (1977).

Section contemplates personal service. *Jones v. Fox*, 49 Ga. App. 573, 176 S.E. 530 (1934).

Personal service is required where service of rule nisi in connection with motion for new trial is not waived. *Brazier v. Hunter*, 103 Ga. App. 854, 121 S.E.2d 39 (1961); *Dunn v. Dunn*, 221 Ga. 368, 144 S.E.2d 758 (1965).

Service by leaving copy of motion at residence of respondent is insufficient. *Jones v. Fox*, 49 Ga. App. 573, 176 S.E. 530 (1934).

Service upon attorney of copy of motion satisfies section. — Although caption of motion for new trial does not name defendant as party, service upon his attorney of copy of motion is compliance with service requirement of section. *Hughes v. Newell*, 152 Ga. App. 618, 263 S.E.2d 505 (1979).

Service may be made by movant's attorney and entry of service verified by his affidavit. *Lee v. Cox*, 15 Ga. App. 249, 82 S.E. 941 (1914).

Where service is improper, fact that defendant actually receives notice is immaterial. — It is immaterial and does not provide proper service that defendant actually receives motions for new trial sent through mail or, in some way, learns of filing of motion for new trial. *Dunn v. Dunn*, 221 Ga. 368, 144 S.E.2d 758 (1965).

As to service of amendments to motion for new trial. See *Fleming v. Roberts*, 114 Ga. 634, 40 S.E. 792 (1902); *Robert Portner Brewing Co. v. Cooper*, 116 Ga. 171, 42 S.E. 408 (1902).

Time for Service

Section does not provide any time within which service of rule nisi must be perfected. *Shirley v. Morgan*, 170 Ga. 324, 152 S.E. 831 (1930).

Unless time is fixed, service should be in ample time for preparation for hearing. — Where no time for serving copy of rule nisi is fixed by presiding judge, it should be served in ample time for opposite party to prepare for hearing. *Trammell v. Throgmorton*, 210 Ga. 659, 82 S.E.2d 140 (1954).

While no specific time is prescribed by section within which respondent shall be served with copy of rule nisi issued upon application for new trial, it has been held that service must be had a reasonable time before hearing, and that such service is essential unless waived. *Peavy v. Peavy*, 167 Ga. 219, 145 S.E. 55 (1928).

Where no time is fixed within which service of motion for new trial shall be effected, such service may be perfected even after the hearing of the motion for new trial has been continued, if there be service upon opposite party at such time before date set for final hearing as will enable opposite party to prepare to resist grant of motion. *Webb v. Nobles*, 195 Ga. 287, 24 S.E.2d 27 (1943).

Where rule nisi granted upon application for new trial, or in any order passed continuing hearing upon motion for new trial, there is no limitation of period within which service of rule nisi or other order should be perfected, such service as will give opposite party a reasonable opportunity to prepare for hearing upon motion for new trial and to resist same is sufficient service. *Connor v. State*, 7 Ga. App. 83, 66 S.E. 482 (1909).

Compliance prior to second hearing with order issued regarding first hearing was sufficient. — Rule nisi granted on motion for new trial set hearing for fixed date, and directed that motion be served on opposite party "five days prior to the hearing." On the date fixed for the hearing the trial judge granted an order postponing the hearing to a later date, making no other order as to service. The motion for a new trial was not served five days before the date fixed for the first hearing, but it was duly served five days prior to the date as fixed for the subsequent order of postponement. The court held this was sufficient. *Johnson v. State*, 4 Ga. App. 850, 62 S.E. 540 (1908).

Persons Entitled to Service

All persons interested in sustaining judgment, or who would be affected by reversal, are indispensable parties in motion for new trial, and shall be served with copy of rule nisi. *State Hwy. Dep't v. Roquemore*, 106 Ga. App. 217, 126 S.E.2d 549 (1962).

Term "opposite party" defined. — As regards applications for new trial, term "opposite party" will include all persons, if more than one, who were parties to case and who are interested in sustaining verdict. *Carmichael v. City of Jackson*, 194 Ga. 664, 22 S.E.2d 470 (1942); *Almon v. Citizens & S. Nat'l Bank*, 108 Ga. App. 799, 134 S.E.2d 435 (1963).

Codefendant who has interest in sustaining verdict is entitled to notice. — Where codefendant has interest in sustaining verdict of jury and judgment of court, she is necessary party to motion for new trial and must be served with copy of rule nisi. *Almon v. Citizens & S. Nat'l Bank*, 108 Ga. App. 799, 134 S.E.2d 435 (1963).

Waiver of Service

When waiver of service results. — Waiver results where party appears and pleads to merits, or where he appears and argues matters collateral to motion in manner to indicate that party must have been served, or must have waived service. *Dunn v. Dunn*, 221 Ga. 368, 144 S.E.2d 758 (1965).

Waiver of service results where opposite party appears to argue motion. *Baldwin v. Daniel*, 69 Ga. 782 (1883); *Hopkins v. Jackson*, 147 Ga. 821, 95 S.E. 675 (1918).

Where rule nisi, issued upon filing of motion for new trial, was not served on respondent, and service was not expressly waived, but agreement was made in open court by counsel for respondent, to passage of order setting hearing upon motion at designated time and place, which agreement was recited in order, and counsel for respondent afterwards appeared at time and place set for hearing on motion, these facts amount to waiver by respondent, through counsel, of service of rule nisi. *Beeland v. Butler-Payne Lumber Co.*, 44 Ga. App. 603, 162 S.E. 303 (1932).

Waiver does not result by informing movant's counsel that certain day is suitable to respondent. *Smedley v. Williams*, 112 Ga.

114, 37 S.E. 111 (1900).

Acknowledgment of service of order merely continuing hearing of motion to another date is insufficient to dispense with service of copy of rule nisi. *Thornton v. State*, 16 Ga. App. 210, 84 S.E. 973 (1915).

Dismissal of Motion

Discretion of judge to dismiss untimely served motion. — When time fixed for hearing arrives, and no service has been effected, it is generally a matter in sound discretion of trial judge whether to dismiss motion or to continue final hearing until service is perfected. *Webb v. Nobles*, 195 Ga. 287, 24 S.E.2d 27 (1943); *Trammell v. Throgmorton*, 210 Ga. 659, 82 S.E.2d 140 (1954).

Judgment dismissing motion for new trial, on motion of respondent made at time set for hearing, is not an abuse of trial court's discretion where there has been no personal service on respondent or any waiver of such service. *Brazier v. Hunter*, 103 Ga. App. 854, 121 S.E.2d 39 (1961).

Where there was neither service nor written waiver of service upon opposite party of rule nisi issued in connection with motion for new trial, and where, at first opportunity and before either expressly or impliedly consented to completion of motion or its judicial consideration upon its merits, respondent moved to dismiss proceeding for want of such service, court did not err in dismissing it. *Jackson v. State*, 24 Ga. App. 594, 101 S.E. 710 (1919).

Dismissal is proper where service is not proved. *Strickland v. Bell*, 144 Ga. 494, 87 S.E. 398 (1915).

Failure to attach rule nisi to motion for new trial does not demand dismissal of motion. Trial judge in his discretion may dismiss it or continue matter until motion is perfected. *Stoner v. McDougall*, 235 Ga. 171, 219 S.E.2d 138 (1975).

Dismissal where no rule nisi served, and requirement not waived. — Where the defendant files a motion for new trial, but no rule nisi is attached nor copy of the rule nisi served upon the state, nor does the state waive this requirement, there is no abuse of discretion by the trial court in dismissing the defendant's motion for new trial. *Griggs v. State*, 167 Ga. App. 581, 307 S.E.2d 75 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 495.

C.J.S. — 66 C.J.S., New Trial, § 138.

5-5-45. Amendment of rule nisi.

A rule nisi for a new trial may be amended by adding new grounds not taken at the time the motion was filed. (Orig. Code 1863, § 3432; Code 1868, § 3452; Code 1873, § 3503; Code 1882, § 3503; Civil Code 1895, § 5121; Civil Code 1910, § 5705; Code 1933, § 70-309.)

JUDICIAL DECISIONS

Amendment may be made at any time before motion is finally disposed of. Tifton, T. & G. Ry. v. Chastain, 122 Ga. 250, 50 S.E. 105 (1905); Albritton v. Tygart, 9 Ga. App. 361, 71 S.E. 512 (1911).

Amendment cannot be made after affirmation of judgment by appellate court. Miller v. State, 121 Ga. 135, 48 S.E. 904 (1904); Benning v. Horkan, 123 Ga. 454, 51 S.E. 333 (1905).

Appellate court will not interfere where trial judge refuses further time to make amendment. Barge v. State, 9 Ga. App. 226, 70 S.E. 965 (1911).

Notice of amendment is not necessary. Page v. Blackshear, 75 Ga. 885 (1885); Thomas v. State, 95 Ga. 484, 22 S.E. 315 (1895).

Amendment may set up that verdict was excessive. McLeod v. Morris, 120 Ga. 756, 48 S.E. 188 (1904).

Amendment may insert name of claimant. Lunsford v. Sutton, 3 Ga. App. 94, 59 S.E. 334 (1907).

Brief of testimony may be amended. Vanover v. Turner, 41 Ga. 577 (1871).

Amendment cannot add ground which is without merit. Lester v. Savannah Guano Co., 94 Ga. 710, 20 S.E. 1 (1907).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 509.

C.J.S. — 66 C.J.S., New Trial, § 137.

5-5-46. Operation of rule nisi as supersedeas in criminal cases; superseding of sentence.

(a) The rule nisi on a motion for a new trial in a criminal case shall not operate as a supersedeas unless it is so ordered by the court.

(b) When requested to do so by the defendant or his counsel, the judge trying the case shall grant an order superseding the sentence until the motion for a new trial is heard and decided. (Orig. Code 1863, § 3649; Code 1868, § 3674; Code 1873, § 3724; Code 1882, § 3724; Ga. L. 1899, p. 77, § 1; Penal Code 1895, § 1066; Penal Code 1910, § 1093; Code 1933, § 70-308.)

Cross references. — Stay of proceedings for enforcement of civil judgment, § 9-11-62. Termination of appeal bonds in criminal cases, § 17-6-1.

Law reviews. — For article outlining proposed revisions of appellate procedure rules with comments, prior to the adoption of Art. 2, Ch. 6, T. 5, see 19 Ga. B.J. 145 (1956).

JUDICIAL DECISIONS

Where defendant is admitted to bail under section, forfeiture procedures of § 17-6-71 apply to bond. — Whether defendant is admitted to bail under this section, pending decision on motion for new trial, or under § 5-6-45, pending decision on appeal, forfeiture procedures of § 17-6-71 apply to bond.

Under either Code section trial judge exercises his discretion in permitting release on bail. *State v. Slaughter*, 246 Ga. 174, 269 S.E.2d 446 (1980).

Cited in *Johnson v. Aldredge*, 192 Ga. 209, 14 S.E.2d 757 (1941); *Phillips v. State*, 95 Ga. App. 277, 97 S.E.2d 707 (1957).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 525.

C.J.S. — 66 C.J.S., New Trial, § 128.

5-5-47. Right to give supersedeas bond for bailable offense upon filing of new trial motion; assessment and approval of bond.

(a) It shall be the right of any person convicted of a crime which is bailable under the law, and in which case a motion for a new trial has been filed as provided by law, to give a supersedeas bond immediately upon the filing of the motion for new trial without having to wait for the filing of a notice of appeal.

(b) The judge of the court having jurisdiction of the case, immediately upon the approval and filing of a motion for new trial therein, shall assess the amount of the bond, which shall be approved in the manner provided by law.

(c) The provisions of Code Section 5-6-45, relating to supersedeas and supersedeas bonds when a notice of appeal is filed, shall apply equally to cases when a motion for a new trial is filed. (Ga. L. 1916, p. 157, §§ 1, 2; Code 1933, §§ 6-1006, 6-1007; Ga. L. 1984, p. 415, § 1.)

Cross references. — Termination of appeal bonds in criminal cases, § 17-6-1.

Law reviews. — For comment on *Ingram v. Grimes*, 213 Ga. 652, 100 S.E.2d 914

(1957), holding that the granting of bail after conviction rests on the discretion of the trial court even when a motion for new trial is pending, see 21 Ga. B.J. 235 (1958).

JUDICIAL DECISIONS

Section authorizes trial judge to admit defendant to bail pending disposition of motion. — Proper construction of section is not that it takes away discretion of trial judge in matter of granting bail after conviction, but that it authorizes trial judge, in his discretion, to admit defendant to bail pending disposition of motion for new trial.

Ingram v. Grimes, 213 Ga. 652, 100 S.E.2d 914 (1957), for comment, see 21 Ga. B.J. 235 (1958).

Excessive bail is equivalent of refusal to grant bail, and in such cases habeas corpus is available and appropriate remedy for relief. *Jones v. Grimes*, 219 Ga. 585, 134 S.E.2d 790 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, § 369.

ALR. — Review for excessiveness of sentence in narcotics case, 55 ALR3d 812.

5-5-48. Time of new trial generally.

When a new trial has been granted by the court, the case shall be placed on the docket for trial as though no trial had been had, subject to the rules for continuances provided in this Code. (Orig. Code 1863, § 3646; Code 1868, § 3671; Code 1873, § 3722; Code 1882, § 3722; Civil Code 1895, § 5489; Civil Code 1910, § 6094; Code 1933, § 70-401.)

JUDICIAL DECISIONS

Where new trial granted, case stands ready for trial as if there had been none. Leventhal v. Baumgartner, 209 Ga. 404, 73 S.E.2d 194 (1952).

This section and § 5-5-49 must be construed together. — This section and § 5-5-49 relate to trial of cases in which new trials have been granted, and must be construed together. Henry v. State, 20 Ga. App. 742, 93 S.E. 311 (1917).

Effect of grant of new trial by Supreme Court is to require case to be heard de novo unless specific direction be given in regard thereto. Leventhal v. Baumgartner, 209 Ga. 404, 73 S.E.2d 194 (1952); Baker v. Decatur Lumber & Supply Co., 210 Ga. 805, 82 S.E.2d 820 (1954).

Where issues tried by jury were upon exceptions to an auditor's fact findings. — Where, after rendition of verdict and judgment, new trial is granted, case stands upon docket for trial as if there had been no trial. This applies where case which was one at law had been referred to auditor, and issues tried by jury were upon exceptions to auditor's findings on facts. Mayor of Monroe v. Fidelity & Deposit Co., 50 Ga. App. 865, 178 S.E. 767 (1935).

Where evidence adduced at first trial entitled movant to recovery as matter of law. — Section applies notwithstanding that, under law of case as laid down by appellate court when reversing judgment of trial court and granting new trial, party at whose instance new trial was granted is, under evidence adduced upon trial, entitled, as a matter of law, to recovery. Scott v. Powell Paving Co., 43 Ga. App. 705, 159 S.E. 895 (1931).

Testimony rendered at first trial cannot be ground for dismissal of second trial. — Although testimony of party to case may as a matter of law preclude recovery in his favor, it does so only as respects trial at which testimony is rendered and is not grounds for dismissal of new trial, because after new trial has been granted, case stands in posture of de novo proceeding as though no trial had been had. Napier v. Napier, 221 Ga. 813, 147 S.E.2d 422, appeal dismissed, 222 Ga. 681, 151 S.E.2d 712 (1966).

Testimony, by reason of rendition at one trial, does not operate as admission in judicio which would as a matter of law preclude recovery upon subsequent trial. Scott v. Powell Paving Co., 43 Ga. App. 705, 159 S.E. 895 (1931).

Even where a new trial has been granted on ground that, under testimony of plaintiff himself, plaintiff was as a matter of law not entitled to recover, case stands on docket for trial as though no trial had been had and it is error for court, on call of case for second trial, to dismiss it upon motion of defendant, on ground that testimony of plaintiff as adduced on former trial of case operated to preclude recovery by plaintiff. Cook v. Attapulgis Clay Co., 52 Ga. App. 610, 184 S.E. 334 (1936).

Party's contradictory testimony from first trial is considered extrajudicial admission or impeaching testimony. — Party to case who has testified on former trial of that case may, upon subsequent trial of same case, give testimony in contradiction of his testimony given upon former trial, and, when so testifying, his testimony upon former trial is,

when introduced in evidence on subsequent trial, in nature of an extrajudicial admission or impeaching testimony, whose probative value is for jury. *Scott v. Powell Paving Co.*, 43 Ga. App. 705, 159 S.E. 895 (1931).

While party's testimony at first trial may have been different from his testimony at second trial, and may be introduced as an admission or impeaching testimony, it will be for jury to determine its probative value. *Cook v. Attapulgis Clay Co.*, 52 Ga. App. 610, 184 S.E. 334 (1936).

Charge on second trial cannot be based on evidence or requests from first trial. — Notwithstanding plaintiff in error in first trial made written request for charge on law

of undue influence, nevertheless upon second trial it was error for trial judge to charge on that subject where there was no evidence to authorize charge on undue influence. *Leventhal v. Baumgartner*, 209 Ga. 404, 73 S.E.2d 194 (1952).

Cited in *United States Fid. & Guar. Co. v. Clarke*, 187 Ga. 774, 2 S.E.2d 608 (1939); *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939); *Underwood v. D.C. Heath & Co.*, 64 Ga. App. 180, 12 S.E.2d 464 (1940); *Weatherly v. Parr*, 74 Ga. App. 526, 40 S.E.2d 445 (1946); *Malcom v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955); *Reagan v. Reagan*, 221 Ga. 173, 143 S.E.2d 736 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 228, 229.

ALR. — Liability insurer's duty to pay injured person as affected by appeal or grant of new trial, or pendency of appeal or mo-

tion for new trial, from judgment against insured, or by the fact that time for appeal or motion for new trial has not expired, 31 ALR3d 899.

5-5-49. Trial of cases returned for new trial by appellate courts.

(a) A case decided by the Supreme Court or Court of Appeals which is not finally disposed of by the decision shall stand for further hearing at the term next ensuing after the decision by the appellate court unless the lower court is in session when the decision is made, in which event it shall stand for trial during such term of the lower court.

(b) The clerk of the lower court, upon receipt of the remittitur of the appellate court, shall docket the case for trial in accordance with subsection (a) of this Code section.

(c) The judge presiding may in his discretion postpone the hearing of any such case to a day in the term as to him may seem reasonable; or, if necessary to give proper time for preparation, he may continue the case until the next term of the court. (Ga. L. 1892, p. 103, §§ 1-3; Civil Code 1895, §§ 5490, 5491, 5492; Civil Code 1910, §§ 6095, 6096, 6097; Code 1933, §§ 70-402, 70-403, 70-404.)

Cross references. — For further provisions regarding continuance of cases re-

turned by appellate courts for trial, §§ 9-10-162, 17-8-34.

JUDICIAL DECISIONS

Construction with § 5-5-48. — This section and § 5-5-48 relate to trial of cases in

which new trials have been granted, and must be construed together. *Henry v. State*,

20 Ga. App. 742, 93 S.E. 311 (1917).

Effect of noncompliance with this section.

— Noncompliance with this section does not result in the automatic acquittal of a defendant in a criminal case. In the absence of language clearly evidencing a legislative intent to effectuate such a broad divestiture of jurisdiction, this section must be construed as merely directory. *Butler v. State*, 207 Ga. App. 824, 429 S.E.2d 280 (1993).

Filing of remittitur in clerk's office is prerequisite to reacquisition of jurisdiction by trial court. — If trial court does not acquire jurisdiction by filing of remittitur in clerk's office, it is without authority to take any steps in the case, and has no more right to pass order formally making judgment of Supreme Court its judgment than it had, without so doing, to proceed with trial. *Hagan v. Robert & Co. Assocs.*, 222 Ga. 469, 150 S.E.2d 663 (1966).

Legislative intent is that entry of remittitur restores trial court's jurisdiction. — Unless filing of remittitur in office of trial court operates to restore at once to that court its former jurisdiction over cases, they ought not to be redocketed when remittitur is so filed, and requirement that they immediately be redocketed when remittitur is entered conclusively shows that it was intention of the legislature that trial court's jurisdiction over cases should be restored when mandate of reviewing court reached it through prescribed procedure. *Hagan v. Robert & Co. Assocs.*, 222 Ga. 469, 150 S.E.2d 663 (1966).

Receipt of remittitur by clerk invests trial court with authority to enforce judgment of affirmance. *Knox v. State*, 113 Ga. 929, 39 S.E. 330 (1901).

Remittitur must be entered upon minutes of lower court before trial can proceed. *Lyon v. Lyon*, 103 Ga. 747, 30 S.E. 575 (1898); *Hubbard v. McCrea*, 103 Ga. 680, 30 S.E. 628 (1898).

Remittitur need not be made judgment of trial court before clerk redockets case. — Section cannot possibly mean that remittitur must be made judgment of trial court and spread upon its minutes before clerk of that

court proceeds to redocket cases. On the contrary, it contemplates that cases shall be immediately entered upon docket of trial court, in order that judge, on reaching cases in their regular order, can dispose of them by carrying into effect the judgment rendered by reviewing court. *Hagan v. Robert & Co. Assocs.*, 222 Ga. 469, 150 S.E.2d 663 (1966).

Effect of grant of new trial is to require a hearing de novo, wherein new facts may be shown. *Anderson v. Clark*, 70 Ga. 362 (1883).

Reversal neither serves as substitute for findings for appellant nor enlarges trial judge's powers. — Judgment of reversal, without more, operates only to vacate orders and decree as therein stated, and to reinvest trial court with jurisdiction on filing of remittitur in office of clerk of trial court. It neither serves as a substitute for findings for appellant, nor enlarges powers of trial judge in reference thereto. *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939).

Effect of reversal without express direction to lower court. — Where on return of remittitur in case in which there was judgment of reversal but not express direction of Supreme Court to lower court, case stands as reversed, and new trial must be had on issues therein raised since case illegally terminated. *Rawdin v. Conner*, 211 Ga. 52, 84 S.E.2d 50 (1954).

Reversal for refusal of nonsuit (now dismissal) or new trial does not put case out of court. — Where error assigned on overruling of demurrer (now motion to dismiss), refusal to grant nonsuit, and overruling motion for new trial, judgment of reversal will not put case out of court as on nonsuit. *Louisville & N.R.R. v. Ramsay*, 137 Ga. 573, 73 S.E. 847, 1913B Ann. Cas. 108 (1912).

Taxing costs in trial court before entry of judgment on remittitur. — See *Bartlett v. Taylor*, 147 Ga. 85, 92 S.E. 940 (1917).

Cited in American Associated Cos. v. Vaughan, 210 Ga. 141, 78 S.E.2d 43 (1953); *Malcom v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955); *Baldwin v. State*, 142 Ga. App. 758, 237 S.E.2d 3 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, §§ 963, 964.

ALR. — Propriety of limiting to issue of damages alone new trial granted on ground

of inadequacy of damages awarded, 98 ALR 941; 29 ALR2d 1199.

Propriety of limiting to issue of damages

alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

5-5-50. Standard for review by appellate court of first grant of new trial.

The first grant of a new trial shall not be disturbed by an appellate court unless the appellant shows that the judge abused his discretion in granting it and that the law and facts require the verdict notwithstanding the judgment of the presiding judge. (Civil Code 1895, § 5585; Civil Code 1910, § 6204; Code 1933, § 6-1608.)

History of section. — This section is derived from the decision in *Sparks v. Noyes*, 64 Ga. 437 (1879).

Law reviews. — For article comparing

sections of Ch. 11, T. 9 with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

GRANT OF NEW TRIAL ON CERTIORARI

APPLICABILITY

CONSTRUCTION

General Consideration

Neither § 9-11-50(c) nor any other provision changes the law under this section prior to Civil Practice Act, that first grant of new trial is not error unless evidence demands verdict for party opposing the motion. *Martin v. Denson*, 117 Ga. App. 288, 160 S.E.2d 210 (1968).

Court lacks jurisdiction to consider oral motion for new trial. — Where motion for new trial is made orally, there is no legal motion for new trial before court, and court is without jurisdiction to entertain or consider the motion. *Motor Contract Co. v. Wington*, 116 Ga. App. 398, 157 S.E.2d 321 (1967).

When reviewable judgment becomes final. — Reviewable judgment does not become final, however, until time prescribed by law for appealing it has passed, or if appealed, until such judgment is affirmed by appellate court and judgment of appellate court made judgment of trial court. *Seaboard Air Line R.R. v. Whitman*, 107 Ga. App. 375, 130 S.E.2d 272 (1963).

New trials on evidentiary grounds where no evidence supports verdict. — Discretion to grant or refuse motions for new trials

because verdict is strongly and decidedly against weight of evidence rests solely in presiding judge, and while appellate division of Municipal Court of Atlanta may, as any other court of review, grant a new trial when there is no evidence to support verdict, where there was some evidence on which verdict could be based, and such verdict had approval of trial judge, appellate division of Municipal Court of Atlanta erred in granting new trial. *Turner v. Masonic Relief Ass'n*, 52 Ga. App. 374, 183 S.E. 350 (1936).

Appellate courts will not interfere with first grant of new trial when there is any evidence at all upon which different verdict could be sustained. *Maloy v. Planter's Whse. & Lumber Co.*, 142 Ga. App. 69, 234 S.E.2d 807 (1977).

After one grant of new trial, subsequent grant upon discretionary grounds will be closely examined to see that discretion of court below has been justly and wisely exercised, in view of facts of particular case, and with due regard to general consideration of fitness of juries to ascertain facts and of necessity that there must be some end to litigation. *Smith v. State Mut. Life Ins. Co.*, 45 Ga. App. 633, 165 S.E. 896 (1932).

Where law and facts of the case do not demand verdict for either party, the first grant of a new trial will not be disturbed on appeal. *Hicks v. American Interstate Ins. Co.*, 158 Ga. App. 220, 279 S.E.2d 517 (1981).

Cited in *Southern Ry. v. Higgins*, 102 Ga. 586, 27 S.E. 785 (1897); *Carolee v. Handelis*, 103 Ga. 299, 29 S.E. 935 (1898); *Knight v. Isom*, 113 Ga. 613, 39 S.E. 103 (1901); *Cordray v. Savannah, T. & I. of H. Ry.*, 117 Ga. 464, 43 S.E. 755 (1903); *McCain v. Bonner*, 122 Ga. 842, 51 S.E. 36 (1905); *Bagley & Willet v. Shumate*, 128 Ga. 78, 57 S.E. 99 (1907); *Cox v. Grady*, 132 Ga. 368, 64 S.E. 262 (1909); *Schaufele v. Central of Ga. Ry.*, 6 Ga. App. 660, 65 S.E. 708 (1909); *New v. Southern Ry.*, 136 Ga. 778, 71 S.E. 1104 (1911); *Castelen v. Stafford*, 138 Ga. 419, 75 S.E. 418 (1912); *Hudson v. Driver*, 13 Ga. App. 174, 78 S.E. 1013 (1913); *Massey v. Cleveland*, 141 Ga. 774, 82 S.E. 136 (1914); *Savage v. Atlantic C.L.R.R.*, 16 Ga. App. 537, 85 S.E. 675 (1915); *Central of Ga. Ry. v. Morgan*, 145 Ga. 656, 89 S.E. 760 (1916); *Allen v. Gershon & Ruskin*, 19 Ga. App. 500, 91 S.E. 893 (1917); *Chafin v. Tumlin*, 20 Ga. App. 433, 93 S.E. 50 (1917); *Parks v. Stevens*, 21 Ga. App. 180, 94 S.E. 60 (1917); *Shingler v. Yeates*, 147 Ga. 339, 94 S.E. 467 (1917); *Duncan v. Shackelford*, 22 Ga. App. 220, 95 S.E. 760 (1918); *Bell v. Askins*, 150 Ga. 635, 104 S.E. 421 (1920); *Sampson v. Smith*, 29 Ga. App. 683, 116 S.E. 652 (1923); *Puckett v. Heaton*, 157 Ga. 232, 121 S.E. 240 (1924); *Maner v. Clark-Stewart Co.*, 33 Ga. App. 424, 126 S.E. 871 (1925); *Nabors v. Nabors*, 161 Ga. 382, 131 S.E. 45 (1925); *Louisville & N.R.R. v. Barksdale*, 34 Ga. App. 812, 131 S.E. 298 (1926); *Riggins v. Scott*, 35 Ga. App. 465, 133 S.E. 647 (1926); *Douglas v. Hardin*, 161 Ga. 838, 131 S.E. 896 (1926); *Belcher v. Land*, 37 Ga. App. 346, 140 S.E. 423 (1927); *Brooks v. Jackins*, 38 Ga. App. 57, 142 S.E. 574 (1928); *Gunn v. Chapman*, 166 Ga. 279, 142 S.E. 873 (1928); *National Union Fire Ins. Co. v. Ozburn*, 38 Ga. App. 276, 143 S.E. 623 (1928); *Howell v. Booth*, 39 Ga. App. 41, 145 S.E. 910 (1928); *Dodgen v. Fowler*, 39 Ga. App. 515, 147 S.E. 775 (1929); *Whitworth v. Carter*, 39 Ga. App. 625, 147 S.E. 904 (1929); *Johnson v. Johnson*, 169 Ga. 7, 149 S.E. 564 (1929); *Finance Serv. Co. v. Rich*, 41 Ga. App. 831, 155 S.E. 60 (1930); *Tyus v. Collier*, 171 Ga. 519, 156 S.E. 235 (1930); *Murray v. Davidson*, 174 Ga. 213, 162

S.E. 526 (1932); *Smith v. Perry*, 176 Ga. 775, 168 S.E. 770 (1933); *Mobley v. Bell*, 177 Ga. 876, 171 S.E. 701 (1933); *Sturr v. Southern Grocery Stores, Inc.*, 48 Ga. App. 126, 172 S.E. 231 (1933); *National Life & Accident Ins. Co. v. Cantrell*, 49 Ga. App. 368, 175 S.E. 543 (1934); *Piedmont Wagon & Mfg. Co. v. Bird*, 49 Ga. App. 426, 176 S.E. 109 (1934); *Blitch v. Wells*, 180 Ga. 566, 179 S.E. 629 (1935); *Belk v. Cook*, 51 Ga. App. 163, 179 S.E. 870 (1935); *International Harvester Co. of Am. v. Felton*, 56 Ga. App. 290, 192 S.E. 464 (1937); *Carter v. Powell*, 57 Ga. App. 360, 195 S.E. 466 (1938); *Walker v. McCallum*, 59 Ga. App. 895, 2 S.E.2d 514 (1939); *Lawson v. Lawson*, 61 Ga. App. 787, 7 S.E.2d 603 (1940); *Jacobs v. Rittenbaum*, 193 Ga. 838, 20 S.E.2d 425 (1942); *Tomlin v. Georgia Power Co.*, 68 Ga. App. 412, 23 S.E.2d 92 (1942); *Suggs v. Suggs*, 198 Ga. 18, 30 S.E.2d 927 (1944); *Pope v. United States Fid. & Guar. Co.*, 198 Ga. 304, 31 S.E.2d 602 (1944); *Veneer Mfg. Co. v. Hill*, 72 Ga. App. 28, 32 S.E.2d 838 (1945); *Sullivan v. Dixon*, 72 Ga. App. 507, 34 S.E.2d 318 (1945); *Jones v. J.S.H. Co.*, 201 Ga. 611, 40 S.E.2d 752 (1946); *Ash v. Higgins*, 74 Ga. App. 726, 41 S.E.2d 270 (1947); *Bowman v. Bowman*, 203 Ga. 206, 45 S.E.2d 415 (1947); *Graves v. Carter*, 78 Ga. App. 564, 51 S.E.2d 863 (1949); *Fuller v. Cox*, 81 Ga. App. 301, 58 S.E.2d 513 (1950); *Williams v. Redd*, 82 Ga. App. 135, 60 S.E.2d 528 (1950); *Dorsey v. Georgia R.R. Bank & Trust Co.*, 82 Ga. App. 237, 60 S.E.2d 828 (1950); *Schofield v. Langley*, 207 Ga. 430, 61 S.E.2d 838 (1950); *Community Hosp. v. Latimer*, 83 Ga. App. 6, 62 S.E.2d 379 (1950); *Seabolt v. Lewis*, 207 Ga. 691, 63 S.E.2d 894 (1951); *Sims Estates, Inc. v. Walker*, 209 Ga. 534, 74 S.E.2d 465 (1953); *James v. Perry*, 90 Ga. App. 69, 81 S.E.2d 874 (1954); *Robinson v. Modern Coach Corp.*, 91 Ga. App. 440, 85 S.E.2d 826 (1955); *Tifton Prod. Credit Ass'n v. Burkhalter Chevrolet Co.*, 92 Ga. App. 571, 89 S.E.2d 210 (1955); *Law v. State*, 92 Ga. App. 604, 89 S.E.2d 550 (1955); *Buchanan v. Nash*, 211 Ga. 874, 89 S.E.2d 637 (1955); *Horne v. Phillips*, 92 Ga. App. 651, 89 S.E.2d 682 (1955); *Plymouth Record Corp. v. Books, Inc.*, 92 Ga. App. 753, 90 S.E.2d 336 (1955); *McCormick v. Denny*, 212 Ga. 444, 93 S.E.2d 578 (1956); *Taylor v. Taylor*, 212 Ga. 637, 94 S.E.2d 744 (1956); *Funderburk v. Funderburk*, 212 Ga. 740, 95 S.E.2d 679

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(1956); *Hayes v. Dicks*, 95 Ga. App. 11, 96 S.E.2d 627 (1957); *Home Ins. Co. v. Cook*, 96 Ga. App. 139, 99 S.E.2d 567 (1957); *Chappell v. Clegg*, 97 Ga. App. 752, 104 S.E.2d 541 (1958); *Selman v. Manis*, 100 Ga. App. 422, 111 S.E.2d 747 (1959); *Service Cas. Co. v. Carr*, 101 Ga. App. 70, 113 S.E.2d 175 (1960); *Cox v. Independent Life & Accident Ins. Co.*, 101 Ga. App. 211, 113 S.E.2d 228 (1960); *Kroger Co. v. Perpall*, 105 Ga. App. 682, 125 S.E.2d 511 (1962); *Stone v. Carter*, 218 Ga. 92, 126 S.E.2d 617 (1962); *YMCA of Metro. Atlanta, Inc. v. Bailey*, 107 Ga. App. 417, 130 S.E.2d 242 (1963); *Bennett v. Overby*, 107 Ga. App. 477, 130 S.E.2d 511 (1963); *Willard v. Willard*, 221 Ga. 2, 142 S.E.2d 849 (1965); *Sims v. Georgia Power Co.*, 112 Ga. App. 41, 143 S.E.2d 652 (1965); *Hambrick v. Nova*, 112 Ga. App. 258, 144 S.E.2d 922 (1965); *Holden v. CTC Fin. Corp.*, 113 Ga. App. 318, 147 S.E.2d 846 (1966); *Harper v. Green*, 113 Ga. App. 557, 149 S.E.2d 163 (1966); *Peak v. Cody*, 113 Ga. App. 674, 149 S.E.2d 519 (1966); *Botero v. Botero*, 223 Ga. 380, 155 S.E.2d 381 (1967); *State Hwy. Dep't v. Smith*, 117 Ga. App. 210, 160 S.E.2d 215 (1968); *Howard v. Biles*, 117 Ga. App. 384, 160 S.E.2d 620 (1968); *Warren v. Mann*, 117 Ga. App. 787, 161 S.E.2d 894 (1968); *Smith v. Clark*, 123 Ga. App. 458, 181 S.E.2d 551 (1971); *Hammock v. Allstate Ins. Co.*, 124 Ga. App. 854, 186 S.E.2d 353 (1971); *Wooten v. Nash*, 126 Ga. App. 86, 190 S.E.2d 89 (1972); *Hunt v. Denby*, 128 Ga. App. 523, 197 S.E.2d 489 (1973); *Edgeman v. Thomas*, 132 Ga. App. 866, 209 S.E.2d 658 (1974); *Blanchard v. Westview Cem.*, 133 Ga. App. 262, 211 S.E.2d 135 (1974); *Davis v. Monroe County Hosp. Auth.*, 137 Ga. App. 214, 223 S.E.2d 255 (1976); *Rasmussen v. Martin*, 236 Ga. 267, 223 S.E.2d 663 (1976); *Helton v. Zellmer*, 238 Ga. 735, 235 S.E.2d 35 (1977); *Cox v. K-Mart Enters. of Ga., Inc.*, 143 Ga. App. 30, 237 S.E.2d 432 (1977); *Diamondhead Corp. v. Robinson*, 144 Ga. App. 60, 240 S.E.2d 572 (1977); *Hudgins v. Bacon*, 171 Ga. App. 856, 321 S.E.2d 359 (1984); *Green v. Jones*, 254 Ga. 35, 326 S.E.2d 448 (1985); *Davis v. Ramey*, 174 Ga. App. 417, 330 S.E.2d 130 (1985); *Schechter v. Strickland*, 189 Ga. App. 82, 375 S.E.2d 93 (1988).

Grant of New Trial on Certiorari

On certiorari, superior court has wide discretion in granting new trial in lower court, especially if it is the first grant of new trial, where evidence is conflicting and error is assigned on judgment (or verdict and judgment where a jury is involved) as contrary to law and evidence, although judgment of lower court may be authorized. *Deaton v. Taliaferro*, 80 Ga. App. 685, 57 S.E.2d 215 (1950).

New trial granted on certiorari is equivalent to new trial granted by presiding judge. — Sustaining of certiorari and grant of new trial thereunder are on same basis as grant of new trial by presiding judge and rules applicable thereto, but in such event, judge of superior court does not have authority to sustain certiorari and then render final judgment. *Deaton v. Taliaferro*, 80 Ga. App. 685, 57 S.E.2d 215 (1950).

Grant of new trial on certiorari not disturbed where evidence did not demand verdict. — Where action of judge of superior court in sustaining certiorari had effect of granting new trial, this being first grant of new trial, and evidence not having demanded verdict, grant of certiorari was not disturbed. *Sunbeam Heating Co. v. Mason*, 42 Ga. App. 265, 155 S.E. 769 (1930).

Rule that appellate court will not interfere with first grant of new trial unless verdict was absolutely demanded applies to decisions on certiorari. *Shirley v. Swafford*, 119 Ga. 43, 45 S.E. 722 (1903).

Applicability

First grant of new trial refers only to first grant by trial court and does not include new trials granted by appellate court where new trial was refused below. *Throgmorton v. Trammell*, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

Section applies even though successor of judge presiding at trial passes on motion. — Section applies even though judge who hears case ceases to hold office before hearing of motion for new trial, and it is passed on by his successor. *Berman v. Berman*, 231 Ga. 216, 200 S.E.2d 870 (1973).

Section applies to first grant of new trial by judge not presiding at whole trial. — First grant of new trial by judge who did not preside during the whole trial will not be

disturbed, unless evidence demanded the verdict rendered. *Brice & Co. v. Whitehurst & Hilliard*, 8 Ga. App. 291, 68 S.E. 1075 (1910), later appeal, 14 Ga. App. 209, 80 S.E. 670 (1914); *Throgmorton v. Trammell*, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

Section applies to damage suits as well as to others. *Holland v. Williams*, 3 Ga. App. 636, 60 S.E. 331 (1908).

Section applies where motion for new trial is based on directed verdict. — Section applies as well where motion for new trial is based on directed verdict as where motion is based upon finding of jury upon issues submitted to them in instructions of court. *Cloud v. Hawkes Co.*, 18 Ga. App. 772, 90 S.E. 652 (1916).

It is error to grant first new trial where law and evidence demands verdict as rendered, whether it was directed by court or returned at volition of jury. *Jones Motor Co. v. W.R. Finch Motor Co.*, 34 Ga. App. 399, 129 S.E. 915 (1925).

Two successive verdicts rendered and new trials granted, one to each party. — Rule that first grant of new trial will not be disturbed except where verdict is demanded by evidence is applicable to case where two successive verdicts have been rendered, one for plaintiff and the other for defendant, and where in each instance a new trial was granted. *Jordan v. Dooly*, 129 Ga. 392, 58 S.E. 879 (1907); *Owens v. Cocroft*, 11 Ga. App. 235, 74 S.E. 1098 (1912); *Butler v. Sansone*, 138 Ga. 767, 76 S.E. 54 (1912); *Elder v. Woodruff Hdwe. Co.*, 19 Ga. App. 626, 91 S.E. 942 (1917).

New trial granted because of conviction of material witness of perjury. — Where trial court stated in order that new trial was granted because of conviction of material witness for defendant of offense of perjury committed in giving of testimony to jury rendering verdict complained of, this was not such ruling on question of law as would prevent operation of this section with respect to first grant of new trial. *George A. Hormel & Co. v. Ramsey*, 62 Ga. App. 343, 7 S.E.2d 789 (1940).

Section is applicable when grant is conditional and condition is not complied with. *Skipper v. Overall*, 47 Ga. App. 691, 171 S.E. 310 (1933).

Where grant of new trial does not specify ground on which granted. — Where sole

assignment of error is judgment of trial judge granting first new trial in favor of defendant on motion containing usual general and several special grounds, judgment not specifying upon which grounds new trial is granted, and where verdict in favor of plaintiff in stated sum in suit on open account is not demanded by evidence, which was in conflict both as to value of work performed and authority to perform it, discretion of judge in granting new trial will not be disturbed. *Tri-State Augusta, Inc. v. Woodward Lumber Co.*, 88 Ga. App. 748, 77 S.E.2d 769 (1953).

Grant of motions both for new trial and for judgment n.o.v. — When a trial court grants separate motions for judgment notwithstanding the verdict and for new trial on the general grounds, the grant of the motion for new trial is conditional on the appellate court's vacating or reversing the judgment n.o.v. *Hicks v. American Interstate Ins. Co.*, 158 Ga. App. 220, 279 S.E.2d 517 (1981).

New trial was error where evidence demanded verdict rendered. — The grant of a new trial was an abuse of the trial court's discretion, where the evidence demanded the verdict rendered. *Builders Transp., Inc. v. Hall*, 191 Ga. App. 889, 383 S.E.2d 341, cert. denied, 191 Ga. App. 921, 383 S.E.2d 341 (1989).

Construction

In first grant of new trial, trial judge has broad discretion and having exercised that discretion appellate courts are powerless to interfere unless verdict was demanded. *Garrett v. Garrett*, 128 Ga. App. 594, 197 S.E.2d 739 (1973).

Appellate courts will not closely scrutinize facts with view to detecting abuses of discretion. — First grant of new trial will not be reversed unless it plainly and manifestly appears that there was an abuse of discretion by court below, and court will not closely scrutinize facts in evidence or endeavor to balance with great exactness the testimony on both sides, with view to detecting abuse of discretion by trial judge. Exercise of discretion in favor of granting new trials should be encouraged. *Baker v. McGarr*, 187 Ga. 533, 1 S.E.2d 403 (1939).

Fact that it appears judge considers improper matter in considering motion, does not affect rule. *Mays v. Mays*, 33 Ga. App.

Construction (Cont'd)

335, 126 S.E. 299 (1924).

Scope of discretion of judge not presiding at trial is narrower than presiding judge's. —

Scope within which discretion may be exercised, in consideration of evidence, by judge who did not preside at trial is not as extensive as in case of judge who heard and observed witnesses, and who, in a sense, is to be considered as thirteenth member of jury. *Brice & Co. v. Whitehurst & Hilliard*, 8 Ga. App. 291, 68 S.E. 1075 (1910), later appeal, 14 Ga. App. 209, 80 S.E. 670 (1914); *Throgmorton v. Trammell*, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

Trial court, in its discretion, can grant extraordinary out-of-term motion for new trial where the circumstances warrant such relief. *Tedoff v. B & L Serv. Co.*, 167 Ga. App. 452, 306 S.E.2d 719 (1983).

Setting aside judgment because of excessive verdict is in nature of grant of new trial on general grounds. *Baxter v. Weiner*, 246 Ga. 28, 268 S.E.2d 619 (1980).

Where evidence is conflicting, first grant of new trial will not be reversed. *Adams v. Hancock*, 103 Ga. 561, 29 S.E. 715 (1897); *Bluestein v. Amason*, 49 Ga. App. 201, 174 S.E. 735 (1934); *Queen v. State Hwy. Dep't*, 100 Ga. App. 190, 110 S.E.2d 541 (1959).

Where evidence on main question in case is in conflict, and where jury would have been authorized to render verdict for movants, judgment granting first new trial will not be disturbed by Supreme Court. *Hopkins v. Brumbelow*, 195 Ga. 388, 24 S.E.2d 318 (1943).

It is never an abuse of discretion to grant new trial where evidence conflicts. *Chappell v. Clegg*, 97 Ga. App. 752, 104 S.E.2d 541 (1958).

First grant of new trial not reversed unless law and facts require verdict. — First grant of new trial will not be reversed unless record clearly makes it appear that law and facts require the verdict. *National Bellas-Hess Co. v. Patrick*, 49 Ga. App. 280, 175 S.E. 255 (1934); *George A. Hormel & Co. v. Ramsey*, 62 Ga. App. 343, 7 S.E.2d 789 (1940); *Noles v. Andalusia Casket Co.*, 74 Ga. App. 39, 38 S.E.2d 746 (1946); *Tri-State Augusta, Inc. v. Woodward Lumber Co.*, 88 Ga. App. 748, 77 S.E.2d 769 (1953); *Green v. Stafford*, 214 Ga. 830, 108 S.E.2d 271 (1959).

Where it does not appear that verdict was demanded under law and evidence, first grant of new trial will not be disturbed. *Baker v. McGarr*, 187 Ga. 533, 1 S.E.2d 403 (1939).

This section and § 5-5-25 contain no language from which it can be inferred that grant of first new trial is ever an abuse of discretion, unless verdict set aside was demanded by evidence adduced upon trial. *Georgia S. & F. Ry. v. Bryan*, 15 Ga. App. 253, 82 S.E. 913 (1914); *Williams v. State*, 27 Ga. App. 224, 107 S.E. 620 (1921); *Throgmorton v. Trammell*, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

When first new trial has been granted expressly upon ground that verdict is contrary to law and without evidence to support it, Court of Appeals will affirm judgment where verdict rendered was not as a matter of law demanded. *Tanner v. Louisville & N.R.R.*, 45 Ga. App. 734, 165 S.E. 761 (1932).

Where evidence on trial does not demand verdict for plaintiff it cannot be said that trial judge abuses his discretion in granting defendant's motion for new trial. *Anderson v. Interstate Life & Accident Ins. Co.*, 94 Ga. App. 411, 94 S.E.2d 758 (1956).

Only question appellate courts will consider on appeal of first grant of new trial is whether verdict as rendered was demanded as a matter of law. *Bass v. Pharr*, 98 Ga. App. 125, 105 S.E.2d 236 (1958).

If evidence demands verdict rendered, first grant of new trial will be reversed. *Moody v. Moody*, 194 Ga. 843, 22 S.E.2d 837 (1942).

There is no error in granting new trial unless trial judge abuses his discretion and no other verdict than that rendered could have been returned. *Maxwell v. Harrell*, 115 Ga. App. 97, 153 S.E.2d 653 (1967).

Where conflict in evidence could have been resolved in favor of either party, and evidence did not demand verdict for defendant, in absence of showing of manifest abuse of discretion on part of trial court in its first grant of new trial, its judgment will not be disturbed. *Lanier v. Collins*, 91 Ga. App. 486, 85 S.E.2d 788 (1955).

The first grant of new trial to either party is not to be reversed by an appellate court unless the verdict set aside by the trial court was absolutely demanded. *Holton v. Jones*, 174 Ga. App. 654, 331 S.E.2d 26 (1985).

Standard of review. — First grant of motion for new trial will not be disturbed where there is any evidence to support movant, unless verdict for opposite party is demanded. *Winn Dixie Stores, Inc. v. Whaley*, 127 Ga. App. 381, 193 S.E.2d 279 (1972).

First grant of new trial on general grounds will not be disturbed by reviewing court, where reviewing court cannot say that evidence demands finding that debt in question has been paid despite jury finding that it had been, and where movant specifically points out evidence and reasons why it claimed verdict is not supported by evidence. *Dunn v. Gilbert*, 217 Ga. 358, 122 S.E.2d 93 (1961).

Where facts do not require verdict in amount rendered. — Where verdict is for unliquidated damages, it is not error to grant new trial even though verdict for plaintiff in some amount may be demanded, since facts do not require verdict in amount rendered. *Robinson v. Modern Coach Corp.*, 91 Ga. App. 440, 85 S.E.2d 826 (1955).

Fact that evidence as to damages is vague. — Where there was abundant evidence to support finding that contract had been breached, which would have entitled plaintiff to nominal damages at least, trial court did not abuse its discretion in first grant of new trial, even though evidence was vague as to amount of damages resulting from breach. *Robbins v. Hays*, 107 Ga. App. 12, 128 S.E.2d 546 (1962).

Standard used in reviewing denial of judgment n.o.v. applies. — In determining whether verdict was demanded, reviewing court must measure issues by same strict standard which would apply had situation been reversed, and had plaintiff in error appealed from denial of motion for judgment notwithstanding verdict following denial of motion to direct verdict in his favor.

Robbins v. Hays, 107 Ga. App. 12, 128 S.E.2d 546 (1962).

Only in those cases where a motion for judgment n.o.v. would have been sustained if litigant had lost his case will grant of a first new trial be error where in fact he won it. *Robbins v. Hays*, 107 Ga. App. 12, 128 S.E.2d 546 (1962).

Constitutionality of Ga. L. 1959, p. 353, § 1, purporting to revise this section. — See *CTC Fin. Corp. v. Holden*, 221 Ga. 809, 147 S.E.2d 427 (1966).

First grant of new trial on special grounds involving question of law is reviewable in proper appeal. *Smith v. Telecable of Columbus, Inc.*, 238 Ga. 559, 234 S.E.2d 24 (1977).

Court of Appeals and Supreme Court possess power to review grants of new trials when order is limited to special grounds. *Durrett v. Farrar*, 130 Ga. App. 298, 203 S.E.2d 265 (1973), overruled on other grounds, *Smith v. Telecable of Columbus, Inc.*, 140 Ga. App. 755, 232 S.E.2d 100 (1976).

First grant of new trial, unless on general, discretionary grounds, is reviewable by Court of Appeals. *Southern States, Inc. v. Thomason*, 128 Ga. App. 667, 197 S.E.2d 429 (1973), overruled, *Smith v. Telecable of Columbus, Inc.*, 140 Ga. App. 755, 232 S.E.2d 100 (1976), reversed, *Smith v. Telecable of Columbus, Inc.*, 238 Ga. 559, 234 S.E.2d 24 (1977).

Amendment to motion designated as special ground but merely elaborating general grounds. — Though ground of amendment to motion for new trial is designated as a special ground, if it appears that it is no more than an elaboration of general grounds, or one of them, it is itself a general ground. *L.F. Dommerich & Co. v. Phillips Sales Co.*, 112 Ga. App. 621, 145 S.E.2d 830 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 549-555.

ALR. — Absence of evidence supporting charge of lesser degree of homicide as affect-

ing duty of court to instruct as to, or right of jury to convict of, lesser degree, 21 ALR 603; 27 ALR 1097; 102 ALR 1019.

5-5-51. Written basis for exercise of judicial discretion for new trial.

In all civil cases in which a new trial is granted, if the grant of a new trial is based on the discretion of the judge, the judge shall set forth by written order the reason or reasons for the exercise of his discretion. Such order shall not be required to conform to the provisions of Code Section 9-11-52, relating to findings by the court. (Code 1981, § 5-5-51, enacted by Ga. L. 1985, p. 1312, § 1.)

JUDICIAL DECISIONS

Cited in *Famiglietti v. Brevard Medical Investors, Ltd.*, 197 Ga. App. 164, 397 S.E.2d 720 (1990).

CHAPTER 6

CERTIORARI AND APPEALS TO APPELLATE COURTS GENERALLY

Article 1	Article 2
General Provisions	Appellate Practice
<p>Sec. 5-6-1. Appearance before court of interested third parties.</p> <p>5-6-2. Disposition of transcript in appellate court.</p> <p>5-6-3. Filing of briefs on court order where cases not disposed of during term; additional argument; effect of failure to comply with order.</p> <p>5-6-4. Bill of costs; payment of costs; filing of affidavit of indigence; payment of costs or filing of affidavit as prerequisite to receipt of application for appeal or brief by clerk.</p> <p>5-6-5. Entry of judgment for costs on reversal.</p> <p>5-6-6. Damages for frivolous appeal.</p> <p>5-6-7. No decisions to be rendered <i>ore tenus</i>; publication of judgments and opinions.</p> <p>5-6-8. Entry of decision on minutes; directions to lower court.</p> <p>5-6-9. Transmittal of opinion to lower court generally.</p> <p>5-6-10. Transmittal of remittitur to lower court generally.</p> <p>5-6-11. Issuance of remittitur in cases involving death penalty.</p> <p>5-6-12. Cessation of supersedeas and issuance of execution upon affirmation of judgment of lower court.</p> <p>5-6-13. Granting of supersedeas in cases of contempt.</p> <p>5-6-14. Execution of extraordinary orders of Supreme Court.</p> <p>5-6-15. Certiorari from Supreme Court to Court of Appeals.</p> <p>5-6-16. Time for appeal by representative where party dies after trial; effect of entry of appeal and of failure to enter appeal; when appeal heard.</p>	<p>Sec. 5-6-30. Purpose of article; construction.</p> <p>5-6-31. Entry of judgment defined.</p> <p>5-6-32. Manner of service of notices and other papers upon parties; waiver or acknowledgment of service.</p> <p>5-6-33. Right of appeal generally.</p> <p>5-6-34. Judgments and rulings deemed directly appealable; procedure for review of judgments, orders, or decisions not subject to direct appeal; scope of review; hearings in criminal cases involving a capital offense for which death penalty is sought.</p> <p>5-6-35. Cases requiring application for appeal; contents, filing, and service of application; exhibits; response by opposing party; issuance of appellate court order regarding appeal; procedure; supersedeas.</p> <p>5-6-36. Filing of motion for new trial and motion for judgment notwithstanding verdict where appeal taken from judgment, ruling, or order.</p> <p>5-6-37. Filing and contents of notice of appeal; service of notice upon parties to appeal.</p> <p>5-6-38. Time of filing notice of appeal; cross appeal; record and transcript for cross appeal; division of costs where cross appeal filed; appeals in capital offense cases for which death penalty is sought.</p> <p>5-6-39. Extensions of time for filing notice of appeal, notice of cross appeal, transcript of evidence, designation of record and other similar motions.</p> <p>5-6-40. Enumeration of errors.</p> <p>5-6-41. Reporting, preparation, and disposition of transcript; correction</p>

APPEAL AND ERROR

Sec.	of omissions or misstatements; preparation of transcript from recollections; filing of disallowed papers; filing of stipulations in lieu of transcript; reporting at party's expense.	Sec.	5-6-46. Operation of notice of appeal as supersedeas in civil cases; requirement of supersedeas bond; fixing of amount; procedure upon no or insufficient filing; effect of bond as to liability of surety.
5-6-42.	Procedure for preparation and filing of transcript of evidence and proceedings where appellant designates matter to be omitted from record on appeal; extensions of time for completion of transcript.	5-6-47.	Operation of notice of appeal and affidavit of indigence as supersedeas in civil cases; procedure for contests as to truth of affidavit.
5-6-43.	Preparation and transmittal of record on appeal by court clerk; retention of copy by clerk; furnishing to Attorney General in capital cases; notification where defendant confined to jail.	5-6-48.	Grounds for dismissal of appeal; amendments; correcting or supplementing record or transcript; effect of dismissal of appeal upon cross appeal; effect of deficiencies upon consideration of appeal.
5-6-44.	Authorization and procedure generally for filing of joint appeals, motions for new trial, and other motions; division of costs between parties.	5-6-49.	Bills of exceptions, exceptions pendente lite, assignments of error abolished; contents of motions for new trial and for j.n.o.v.
5-6-45.	Operation of notice of appeal as supersedeas in criminal cases; bond; review.	5-6-50.	Procedure provided by article supersedes former appellate procedure.
		5-6-51.	Forms.

JUDICIAL DECISIONS

Findings or verdict not disturbed if supported by some evidence. — The findings of a judge acting as a jury will not be disturbed if there is any evidence to support the judgment. *Adams v. Crowell*, 157 Ga. App. 576, 278 S.E.2d 151 (1981).

On appeal of the judgment of a trial judge sitting without a jury, a judgment will not be disturbed if there is any evidence to sustain it. *Collins v. Brayson Supply Co.*, 157 Ga. App. 438, 278 S.E.2d 87 (1981).

In the absence of legal error, an appellate court is without jurisdiction to interfere with a verdict supported by some evidence, even where the verdict may be against the preponderance of the evidence. *Pembroke Mgt., Inc. v. Cossaboon*, 157 Ga. App. 675, 278 S.E.2d 100 (1981).

Jury determines witness credibility and conflicts in evidence. — It is the function of

the jury, not the appellate court, to determine the credibility of witnesses and weigh any conflict in the evidence. *Hudgins v. State*, 159 Ga. App. 723, 285 S.E.2d 73 (1981).

Appellate court views evidence in light most favorable to jury's verdict after it has been rendered. *Hudgins v. State*, 159 Ga. App. 723, 285 S.E.2d 73 (1981).

Court of Appeals will not consider questions raised for first time on appeal. *Mosley v. State*, 157 Ga. App. 578, 278 S.E.2d 154 (1981).

Failure to renew objection. — Where defendant initially objected to the introduction of the complained of evidence, his failure to renew his objection in the absence of an express waiver does not forbid consideration of his objection on appeal. *Bryan v. State*, 157 Ga. App. 635, 278 S.E.2d 177 (1981).

RESEARCH REFERENCES

ALR. — Availability of remedies other than direct appeal from or error to federal court under provision of federal statute denying appeal or writ of error from decision remanding to state court case removed to federal court, 114 ALR 1476.

Right of winning party to appeal from

judgment granting him full relief sought, 69 ALR2d 701.

Right to appellate review of consent judgment, 69 ALR2d 755.

Appealability of order suspending imposition or execution of sentence, 51 ALR4th 939.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Requirement that, in ruling or decision in mandamus or quo warranto proceeding or in case involving writ of prohibition, there be final judgment in trial court prior to appeal to Supreme Court, § 9-6-1. Certification of questions to Supreme Court by federal appellate courts, § 15-2-9. Number of votes of Justices of

Supreme Court required for rendering of decision, § 15-2-16. Number of votes of Judges of Court of Appeals required for rendering of decision, § 15-3-1. Requirement of special license to practice before Supreme Court or Court of Appeals, § 15-19-1.

RESEARCH REFERENCES

ALR. — Effect of reversal or vacation of judgment on execution sale, 29 ALR 1071.

Right of appellate court, in otherwise proper case, to affirm judgment on quantum meruit under a complaint declaring upon an express contract, rather than remanding it because of variance between pleading and proof, 118 ALR 1208.

Necessity of setting aside or reversing entire money judgment because of error in allowing certain items, where the verdict or judgment purports to specify the amounts allowed respectively for the proper and improper items, 135 ALR 1186.

Remittitur on which court has conditioned refusal of new trial or reversal, as

inuring to benefit of codefendant failing to move for new trial or to appeal, 160 ALR 984.

Liability for costs on appeal relating to amount of condemnation award, 50 ALR2d 1386.

Right to file briefs in trial court, 86 ALR2d 1233.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

5-6-1. Appearance before court of interested third parties.

When a case is set for a hearing before the Supreme Court or the Court of Appeals and there are parties besides the plaintiffs and defendants, whether shown by the record or not, who have a direct interest in its result, upon the interest being made to appear the court shall allow the other parties to appear by counsel on equal terms with the parties directly before the court. (Ga. L. 1870, p. 47, § 5; Code 1873, § 4275; Code 1882, § 4275; Civil Code 1895, § 5581; Civil Code 1910, § 6196; Code 1933, § 6-1506.)

JUDICIAL DECISIONS

Cited in *Reed v. Adventist Health Systems/Sunbelt*, 181 Ga. App. 750, 353 S.E.2d 523 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 172-185.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 241, 242.

5-6-2. Disposition of transcript in appellate court.

The transcript of the record shall not be recorded by the clerk of the appellate court but shall be carefully labeled and filed so as to be found easily when needed. (Laws 1847, Cobb's 1851 Digest, p. 454; Code 1863, § 4185; Code 1868, § 4224; Code 1873, § 4289; Code 1882, § 4289; Civil Code 1895, § 5590; Civil Code 1910, § 6209; Code 1933, § 6-1701.)

Cross references. — Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 404-406, 5 Am. Jur. 2d, Appeal and Error, §§ 1009-1024.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 518-525.

5-6-3. Filing of briefs on court order where cases not disposed of during term; additional argument; effect of failure to comply with order.

(a) Whenever the appellate court may be unable to dispose of all cases on its docket for any term before the time fixed by law for the succeeding term to begin, the court may pass an order requiring counsel in all such cases to file their briefs in the clerk's office of the court on or before a certain day prior to the succeeding term. All cases in which briefs are thus filed shall be considered as heard at the term of the court to which returned. They shall be determined and the decision therein shall be announced by the court as soon after the briefs are filed as may be practicable. Should the court desire to hear argument in addition to that submitted in the briefs, the court may pass an order requiring counsel to submit further argument by brief or in open court at such time as may be prescribed in the order.

(b) Upon failure of counsel for the appellant to comply with the order of the court, where no sufficient excuse is shown for noncompliance, the case shall be dismissed for want of prosecution. (Ga. L. 1878-79, p. 151, §§ 1-4; Civil Code 1910, §§ 6198, 6199, 6200, 6201; Code 1933, §§ 6-1602, 6-1603, 6-1604, 6-1605.)

Cross references. — See Ga. Const. 1983, Art. VI, Sec. IX, Para. II. Schedule of terms of Court of Appeals and Supreme Court, §§ 15-2-4, 15-3-2. Filings in clerk's office,

Rules of the Supreme Court of the State of Georgia, Rule 1. Filing with clerk's office, Rules of the Court of Appeals of the State of Georgia, Rule 1.

JUDICIAL DECISIONS

Cited in *Hazen v. Morris*, 94 Ga. App. 634, 95 S.E.2d 765 (1956); *Robinwood, Inc. v.*

Baker, 206 Ga. App. 202, 425 S.E.2d 353 (1992).

RESEARCH REFERENCES

ALR. — Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 ALR2d 1396.

5-6-4. Bill of costs; payment of costs; filing of affidavit of indigence; payment of costs or filing of affidavit as prerequisite to receipt of application for appeal or brief by clerk.

The bill of costs for every application to the Supreme Court for a writ of certiorari or for applications for appeals filed in the Supreme Court or the Court of Appeals or appeals to the Supreme Court or the Court of Appeals shall be \$80.00. The costs shall be paid by counsel for the applicant or appellant at the time of the filing of the application or, in the case of direct appeals, at the time of the filing of the original brief of the appellant. In those cases in which the writ of certiorari or an application for appeal is granted, there shall be no additional costs. Costs shall not be required in those instances when at the time the same are due counsel for the applicant or appellant shall file a statement that an affidavit of indigence has been duly filed or file an affidavit that he or she was appointed to represent the defendant by the trial court because of the defendant's indigency. The clerk is prohibited from receiving the application for appeal or the brief of the appellant unless the costs have been paid or a sufficient affidavit of indigence is filed or contained in the record. (Ga. L. 1921, p. 239, § 1; Code 1933, § 6-1702; Ga. L. 1965, p. 650, § 1; Ga. L. 1982, p. 1186, § 1; Ga. L. 1991, p. 411, § 1.)

Cross references. — Payment by state of bill of costs in appeals or applications filed on behalf of state by a district attorney, § 15-18-13. Costs, Rules of the Supreme Court of the State of Georgia, Rule 11. Costs,

Rules of the Court of Appeals of the State of Georgia, Rule 17.

Law reviews. — For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991).

JUDICIAL DECISIONS

Appellate courts lack jurisdiction to review case where section not complied with. — Court of Appeals is without jurisdiction to review case when costs are not paid and no

affidavit meeting requirements of section is filed by plaintiff in error. *Carson v. Automobile Financing, Inc.*, 96 Ga. App. 336, 99 S.E.2d 903 (1957).

All attorneys representing plaintiff in error are bound jointly and severally for costs.

— All attorneys representing plaintiff in error, as well those heard orally or by briefs as those signing bill of exceptions (see §§ 5-6-49, 5-6-50), are jointly and severally bound for costs, save where pauper affidavit is filed in clerk's office of court below, and certified copy thereof is transmitted to court with and as part of transcript of record, or, if no transcript is required, with bill of exceptions. *Burke v. Seaboard Air Line Ry.*, 46 Ga. App. 488, 168 S.E. 90 (1933).

Transmission of certified copy of pauper's affidavit. — Where certified copy of pauper affidavit which was filed in clerk's office of lower court was filed on same date that bill of exceptions (see §§ 5-6-49, 5-6-50) and transcript of record were filed in court, and certified copy of pauper affidavit was not

transmitted to court until some days after bill of exceptions and transcript of record were filed in court, and was therefore not transmitted with and as a part of transcript of record, plaintiff in error is not relieved from payment of cost. *Burke v. Seaboard Air Line Ry.*, 46 Ga. App. 488, 168 S.E. 90 (1933).

Where next friend institutes suit, pauper's affidavit must assert next friend's indigence.

— Where suit is instituted on behalf of infant by next friend, next friend is primarily liable for costs, hence affidavit prescribed by section must assert inability of next friend to pay costs. *Carson v. Automobile Financing, Inc.*, 96 Ga. App. 336, 99 S.E.2d 903 (1957).

Cited in *Hall v. Hall*, 185 Ga. 502, 195 S.E. 731 (1938); *Pilgrim Health & Life Ins. Co. v. Lee*, 78 Ga. App. 713, 51 S.E.2d 875 (1949).

RESEARCH REFERENCES

C.J.S. — 4 C.J.S., Appeal and Error, §§ 497, 498.

ALR. — Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant, 11 ALR2d 607.

What costs or fees are contemplated by statute authorizing proceeding in forma pauperis, 98 ALR2d 292.

5-6-5. Entry of judgment for costs on reversal.

If there is a judgment of reversal, the appellant shall be entitled to a judgment for the amount of the costs in the appellate court against the appellee as soon as the remittitur is returned to the court below. (Laws 1845, Cobb's 1851 Digest, p. 251; Code 1863, § 4186; Code 1868, § 4225; Code 1873, § 4290; Code 1882, § 4290; Civil Code 1895, § 5591; Civil Code 1910, § 6210; Code 1933, § 6-1704.)

JUDICIAL DECISIONS

Costs on appeal are controlled by this section rather than § 9-11-54. *Barnett v. Thomas*, 129 Ga. App. 583, 200 S.E.2d 327 (1973), disapproved sub nom. *Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc.*, 232 Ga. 92, 205 S.E.2d 293 (1974).

Reporter's transcript and clerk's record are included in costs of appeal. — Reporter's transcript and clerk's record are both required for effective appeal and both are included in costs of appeal. In event of reversal or substantial modification, appel-

lant is entitled to judgment for these costs on return of remittitur. *Barnett v. Thomas*, 129 Ga. App. 583, 200 S.E.2d 327 (1973), disapproved sub nom. *Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc.*, 232 Ga. 92, 205 S.E.2d 293 (1974).

Cost of transcript not recoverable. — The cost of having a transcript prepared by the court reporter is an expense of appeal, but it is not a cost of appeal. An expense of appeal is not recoverable from the appellee where appellant is successful in obtaining a reversal

in an appellate court. *Flight Int'l, Inc. v. Dauer*, 180 Ga. App. 405, 349 S.E.2d 271 (1986).

Where appellate court fails to pass on motion to tax costs, superior court may do so. — Where motion was made that Court of Appeals tax costs of appeal, but that court did not pass upon motion and hence there was no adjudication of question as to how costs should be taxed, assuming that that court had jurisdiction to tax costs, superior court has original and concurrent jurisdiction to pass upon matter. *Sweat v. Ehrensperger*, 100 Ga. App. 58, 109 S.E.2d 889 (1959).

Motion to recover costs timely filed. — Appellant was entitled to recover costs, where its motion for costs, filed 20 days after remittitur was returned and three days after judgment was entered, was filed within "a reasonable time." *Department of Medical Assistance v. Llewellyn*, 197 Ga. App. 231, 398 S.E.2d 256 (1990).

Return of case only for appropriate findings and conclusions, is not judgment of reversal, and plaintiff in error shall not be entitled to judgment for amount of such costs, and there is no error in failure of trial court to tax costs of former appeal to defendant. *Greene v. Colonial Stores, Inc.*, 144 Ga. App. 645, 242 S.E.2d 489 (1978).

Obtaining substantial modification of judgment may entitle one to recovery of costs. — Judgment of reversal is not essential for recovery of costs by plaintiff in error; if plaintiff in error obtains substantial modification of judgment complained of, he is entitled to costs of appeal. *Hartley v. Hartley*, 212 Ga. 62, 90 S.E.2d 555 (1955); *Sweat v. Ehrensperger*, 100 Ga. App. 58, 109 S.E.2d 889 (1959).

Taxing costs for maintaining crossbill of exceptions in criminal cases. — There is no law by which state can maintain crossbill of

exceptions (now cross appeal) in criminal case; and in such case, there being no provision of law for taxing cost against state, cost will be taxed, under § 15-2-44 and this section against solicitor (now district attorney) bringing crossbill. *Mill v. State*, 2 Ga. App. 398, 58 S.E. 673 (1907), later appeal, 3 Ga. App. 414, 60 S.E. 4 (1908) (decided before enactment of Ch. 7 of this Title).

Acceptance and compliance with condition changing reversal into affirmance. — Reversal in Supreme Court carries cost against defendant in error, and judgment therefor is proper under this section, though condition changing reversal into affirmance is accepted and complied with. *Gunnels v. Deavours*, 59 Ga. 196 (1877).

Advance of costs by attorney for plaintiff in error does not defeat levy by plaintiff. — Levy under execution for costs, issued in name of plaintiff for use of officers of court, is not subject to be arrested by affidavit of illegality on account of fact that attorney for plaintiff advanced costs incurred in appellate court. *Harvey v. Long Cigar & Grocery Co.*, 36 Ga. App. 45, 135 S.E. 222 (1926).

Cited in *Murphy v. Drum & Bugle Corps.*, 55 Ga. App. 293, 190 S.E. 67 (1937); *Mendenhall v. Kingloff*, 215 Ga. 726, 113 S.E.2d 449 (1960); *Wood v. Delta Ins. Co.*, 101 Ga. App. 720, 114 S.E.2d 883 (1960); *Dependable Ins. Co. v. Gibbs*, 218 Ga. 305, 127 S.E.2d 454 (1962); *Nail v. Hiers*, 116 Ga. App. 522, 157 S.E.2d 771 (1967); *Herring v. Ferrell*, 137 Ga. App. 156, 223 S.E.2d 213 (1976); *Harris v. Collins*, 145 Ga. App. 827, 245 S.E.2d 13 (1978); *Marshall v. Fulton Nat'l Bank*, 152 Ga. App. 121, 262 S.E.2d 448 (1979); *Bryant v. Randall*, 245 Ga. 200, 264 S.E.2d 231 (1980); *Paul v. Jones*, 160 Ga. App. 671, 288 S.E.2d 13 (1981); *Jamison v. West*, 191 Ga. App. 431, 382 S.E.2d 170 (1989).

RESEARCH REFERENCES

ALR. — Award of costs by appellate court as affected by subsequent proceedings or

course of the action in the lower court, 116 ALR 1152.

5-6-6. Damages for frivolous appeal.

When in the opinion of the court the case was taken up for delay only, 10 percent damages may be awarded by the appellate court upon any

judgment for a sum certain which has been affirmed. The award shall be entered in the remittitur. (Laws 1845, Cobb's 1851 Digest, p. 450; Code 1863, § 4182; Code 1868, § 4221; Code 1873, § 4286; Code 1882, § 4286; Civil Code 1895, § 5594; Civil Code 1910, § 6213; Code 1933, § 6-1801.)

Cross references. — Penalty for frivolous appeals, Rules of the Supreme Court of the State of Georgia, Rule 14. Appeals deemed frivolous, Rules of the Court of Appeals of the State of Georgia, Rule 26.

Law reviews. — For survey of the Georgia cases dealing with workers' compensation from June 1, 1976 through May 31, 1978, see

30 Mercer L. Rev. 269 (1978). For article, "Plying the Erie Waters: Choice of Law in the Deterrence of Frivolous Appeals," see 21 Ga. L. Rev. 653 (1987). For article, "Battling the Many-Headed Hydra: Abusive Litigation Law in Georgia," see 25 Ga. St. B.J. 65 (1988).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION JUDGMENT FOR SUM CERTAIN APPLICATION

1. IN GENERAL
2. WHEN APPEAL IS FRIVOLOUS
3. WHEN APPEAL NOT FRIVOLOUS

General Consideration

Purpose of section is to discourage frivolous appeals. *Dickey v. Millen Fertilizer Co.*, 18 Ga. App. 629, 89 S.E. 1098 (1916); *Thompson Enters., Inc. v. Coskrey*, 168 Ga. App. 181, 308 S.E.2d 399 (1983).

Damages awarded pursuant to section serve dual purpose. — Damages are given not only as penalty upon plaintiff in error, but also as compensation for delay, cost and vexation occasioned thereby to defendant in error. *Hardy v. Truitt*, 20 Ga. App. 529, 93 S.E. 149 (1917).

Section is properly invoked where courts are used to evade judgments. — When courts are used to evade judgments, especially when effort is made on frivolous grounds, after full opportunity has been had for fair adjudication, this provision in nature of penalty is properly invoked. *Felker v. Johnson*, 189 Ga. 797, 7 S.E.2d 668 (1940).

Justice demands damages award where appeal is obviously frivolous. — When record discloses that plaintiff in error has no just case, that no new question of law is involved, and record is full of those things which every judge and every lawyer recognizes as indicia of an attempt to fight merely for time, justice demands that court over-

come any personal hesitancy it may have, and that it add an award of damages to judgment of affirmance. *Prattes v. Southeast Ceramics, Inc.*, 132 Ga. App. 584, 208 S.E.2d 600 (1974).

When motion for 10 percent damages is filed, court shall carefully examine record, and pass upon motion in light of entire history of case as there presented. *Prattes v. Southeast Ceramics, Inc.*, 132 Ga. App. 584, 208 S.E.2d 600 (1974).

Filing of enumeration of errors is essential to completion of appeal. *James v. Seritt*, 121 Ga. App. 783, 175 S.E.2d 163 (1970).

Motion for sum not representing 10 percent of damages dismissed. — Motion for imposition of \$5,000 damages for filing a frivolous appeal will be denied where this sum does not represent 10 percent of the amount of damages awarded by the court below. *Taylor v. Bentley*, 166 Ga. App. 887, 305 S.E.2d 617 (1983).

Cited in *Holmes v. Booher, Fee & Co.*, 41 Ga. 125 (1870); *Eagle Mfg. Co. v. Wise*, 48 Ga. 630 (1873); *Crusselle v. Reinhardt*, 68 Ga. 619 (1882); *Saffold v. Foster*, 75 Ga. 233 (1885); *Bailey v. Wilner*, 107 Ga. 364, 33 S.E. 434 (1899); *Central of Ga. Ry. v. Cooper*, 14 Ga. App. 738, 82 S.E. 310 (1914); *Sirmans v. Folsom & Tillman Hdwe. Co.*, 18 Ga. App.

586, 89 S.E. 1103 (1916); Realty Bond & Mfg. Co. v. Harley, 19 Ga. App. 186, 91 S.E. 254 (1917); Wimberly v. Lumpkin Home Mixture Co., 19 Ga. App. 809, 92 S.E. 286 (1917); Kirkland v. Citizens Trust Co., 19 Ga. App. 133, 91 S.E. 254 (1917); Banks v. Giles, 20 Ga. App. 97, 92 S.E. 651 (1917); Adams v. Duvall, 20 Ga. App. 205, 92 S.E. 955 (1917); Coleman v. Hutcheson, Yeomans & Co., 21 Ga. App. 100, 94 S.E. 94 (1917); Miller v. Walker, 23 Ga. App. 273, 97 S.E. 869 (1919); Bateman v. Small & Tharpe, 24 Ga. App. 244, 100 S.E. 573 (1919); Bailey v. Miller Hdwe. & Furn. Co., 30 Ga. App. 786, 119 S.E. 428 (1923); Johnson v. Hicks, 31 Ga. App. 43, 119 S.E. 437 (1923); Dillingham v. Eslinger, 32 Ga. App. 36, 122 S.E. 627 (1924); Felker v. Still, 35 Ga. App. 236, 133 S.E. 519 (1926); Yeomanis v. Beasley, 36 Ga. App. 467, 137 S.E. 131 (1927); Sheffield v. Sheffield, 38 Ga. App. 685, 145 S.E. 672 (1928); Todd-Worsham Auction Co. v. Underwood, 38 Ga. App. 792, 145 S.E. 889 (1928); Anthony v. Weldon, 40 Ga. App. 499, 150 S.E. 431 (1929); Felker v. Still, 41 Ga. App. 462, 153 S.E. 781 (1930); La Boon v. Wright & Locklin, 42 Ga. App. 275, 155 S.E. 770 (1930); Zurich Gen. Accident & Liab. Ins. Co. v. Rousseau, 42 Ga. App. 349, 156 S.E. 308 (1930); Mortgage Bond & Trust Co. v. Colonial Hill Co., 175 Ga. 150, 165 S.E. 25 (1932); Geer v. Underwood Typewriter Co., 45 Ga. App. 390, 165 S.E. 148 (1932); King v. Irwin, 47 Ga. App. 699, 171 S.E. 302 (1933); Varner v. Darien Bank, 48 Ga. App. 298, 172 S.E. 651 (1934); Sapp v. Sapp, 50 Ga. App. 145, 177 S.E. 265 (1934); Hall v. Eufaula Brick Co., 50 Ga. App. 466, 178 S.E. 403 (1935); Hartsfield Co. v. Ray, 51 Ga. App. 106, 179 S.E. 732 (1935); Campbell Coal Co. v. Pano, 51 Ga. App. 232, 180 S.E. 139 (1935); Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840 (1936); First Joint Stock Land Bank v. Sasser, 185 Ga. 417, 195 S.E. 143 (1938); Hanley v. Rainey, 58 Ga. App. 485, 199 S.E. 248 (1938); Quinn v. O'Neal, 58 Ga. App. 628, 199 S.E. 359 (1938); Boggs v. Shadburn, 65 Ga. App. 683, 16 S.E.2d 234 (1941); Hankin v. Deaton, 68 Ga. App. 113, 22 S.E.2d 341 (1942); Haynie v. Murray, 74 Ga. App. 253, 39 S.E.2d 567 (1946); Adamson v. Gaultney, 74 Ga. App. 820, 41 S.E.2d 657 (1947); Saul Klenberg Co. v. Mrozinski, 78 Ga. App. 59, 50 S.E.2d 247 (1948); Bedgood v. Karp's U-Drive-It Co., 80

Ga. App. 216, 55 S.E.2d 654 (1949); Morrow v. Johnston, 85 Ga. App. 261, 68 S.E.2d 906 (1952); Quillian v. Mabry, 88 Ga. App. 817, 78 S.E.2d 97 (1953); Dickens v. Dickens, 211 Ga. 796, 89 S.E.2d 161 (1955); Tippins v. Spears, 92 Ga. App. 495, 89 S.E.2d 210 (1955); Reserve Life Ins. Co. v. Loyd, 94 Ga. App. 462, 95 S.E.2d 383 (1956); First Am. Acceptance Corp. v. Wheat, 217 Ga. 1, 120 S.E.2d 330 (1961); American Mut. Liab. Ins. Co. v. Quick, 106 Ga. App. 59, 126 S.E.2d 431 (1962); Schnuck v. Riales, 106 Ga. App. 647, 127 S.E.2d 825 (1962); Stanley Home Prods., Inc. v. Lucas, 107 Ga. App. 260, 129 S.E.2d 568 (1963); Borochoff v. Russell, 108 Ga. App. 266, 132 S.E.2d 861 (1963); Wright v. Collins, 117 Ga. App. 105, 159 S.E.2d 468 (1968); Bragg v. Bragg, 224 Ga. 294, 161 S.E.2d 313 (1968); Federated Ins. Group v. Pitts, 118 Ga. App. 356, 163 S.E.2d 841 (1968); Brown v. Royal Wood, Inc., 119 Ga. App. 564, 168 S.E.2d 211 (1969); American Liberty Ins. Co. v. Sanders, 122 Ga. App. 407, 177 S.E.2d 176 (1970); Phoenix Ins. v. Weaver, 124 Ga. App. 423, 183 S.E.2d 920 (1971); Fulton Indus. v. Knight, 127 Ga. App. 604, 194 S.E.2d 346 (1972); Wilson v. Lee, 129 Ga. App. 647, 200 S.E.2d 480 (1973); Buffington v. McClelland, 130 Ga. App. 460, 203 S.E.2d 575 (1973); Knox Jewelry Co. v. Cincinnati Ins. Co., 130 Ga. App. 519, 203 S.E.2d 739 (1974); Security Mgt. Co. v. King, 132 Ga. App. 618, 208 S.E.2d 576 (1974); Kelley v. Whitaker, 133 Ga. App. 229, 211 S.E.2d 176 (1974); American Fin. Co. v. First Nat'l Bank, 134 Ga. App. 24, 217 S.E.2d 364 (1975); Page v. Page, 235 Ga. 131, 218 S.E.2d 859 (1975); Lee v. Goldner, 135 Ga. App. 744, 219 S.E.2d 5 (1975); Motors Ins. Corp. v. Roper, 136 Ga. App. 224, 221 S.E.2d 55 (1975); Hodges v. Hodges, 235 Ga. 848, 221 S.E.2d 597 (1976); Waldrop v. Hite, 236 Ga. 608, 225 S.E.2d 19 (1976); Rea v. Rea, 237 Ga. 50, 226 S.E.2d 589 (1976); Crosby v. Greene, 237 Ga. 56, 226 S.E.2d 739 (1976); Seaboard Coast Line R.R. v. Davis, 139 Ga. App. 138, 227 S.E.2d 915 (1976); Contractors Mgt. Corp. v. McDowell-Kelley, Inc., 139 Ga. App. 4, 228 S.E.2d 6 (1976); Thomas v. Estes, 139 Ga. App. 738, 229 S.E.2d 538 (1976); Insurance Co. of N. Am. v. Puckett, 139 Ga. App. 772, 229 S.E.2d 550 (1976); Richardson v. Richardson, 237 Ga. 830, 229 S.E.2d 641 (1976); Billas v. Dwyer, 140 Ga. App. 774, 232 S.E.2d 102 (1976); Trust Inv.

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& Dev. Co. v. First Ga. Bank, 238 Ga. 309, 232 S.E.2d 828 (1977); Roe v. Williamson, 142 Ga. App. 834, 238 S.E.2d 128 (1977); Associated Distribs., Inc. v. Strozier, 144 Ga. App. 205, 240 S.E.2d 761 (1977); Boyd v. Maslia, 144 Ga. App. 683, 242 S.E.2d 338 (1978); Wood v. Wood, 240 Ga. 861, 242 S.E.2d 529 (1978); Prudential Timber & Farm Co. v. Collins, 144 Ga. App. 849, 243 S.E.2d 80 (1978); Perry v. Dudley, 145 Ga. App. 728, 244 S.E.2d 580 (1978); Nelson v. Fulton County Bank, 147 Ga. App. 98, 248 S.E.2d 173 (1978); Hartford Accident & Indem. Co. v. Mauldin, 147 Ga. App. 230, 248 S.E.2d 528 (1978); Rives E. Worrell Co. v. Key Sys., 147 Ga. App. 383, 248 S.E.2d 686 (1978); F. & G. Ins. Underwriters, Inc. v. Raines, 147 Ga. App. 675, 250 S.E.2d 58 (1978); United States Life Ins. Co. v. Huckaby, 148 Ga. App. 190, 250 S.E.2d 833 (1978); Travelers Ins. Co. v. Gaither, 148 Ga. App. 251, 251 S.E.2d 66 (1978); Match Point, Ltd. v. Adams, 148 Ga. App. 673, 252 S.E.2d 90 (1979); Berman v. Berman, 243 Ga. 246, 253 S.E.2d 706 (1979); Cale v. Cale, 243 Ga. 519, 255 S.E.2d 41 (1979); Thompson v. Stein Steel & Supply Co., 149 Ga. App. 682, 255 S.E.2d 138 (1979); Department of Pub. Safety v. Rodgers, 149 Ga. App. 683, 255 S.E.2d 139 (1979); Grier v. Grier, 243 Ga. 520, 255 S.E.2d 728 (1979); Brannon v. Simpson, 244 Ga. 58, 257 S.E.2d 541 (1979); Pippin v. Brigadier Indus. Corp., 150 Ga. App. 401, 258 S.E.2d 18 (1979); Spivey v. Eavenson, 150 Ga. App. 429, 258 S.E.2d 54 (1979); Walsey v. American Fletcher Nat'l Bank & Trust Co., 151 Ga. App. 104, 258 S.E.2d 760 (1979); Turner v. Turner, 244 Ga. 229, 259 S.E.2d 479 (1979); Ivey Contracting Co. v. Elliott, 151 Ga. App. 361, 259 S.E.2d 658 (1979); McCane v. Cappett Corp., 151 Ga. App. 423, 260 S.E.2d 379 (1979); Metaxis v. Sanders, 151 Ga. App. 702, 261 S.E.2d 651 (1979); Keappler v. Allen, 152 Ga. App. 746, 264 S.E.2d 37 (1979); Scales v. American Lease Plans, Inc., 153 Ga. App. 670, 266 S.E.2d 323 (1980); Morrison v. Morrison, 153 Ga. App. 818, 266 S.E.2d 521 (1980); Trade City G.M.C., Inc. v. May, 154 Ga. App. 371, 268 S.E.2d 421 (1980); Tucker v. Whitehead, 155 Ga. App. 104, 270 S.E.2d 317 (1980); Davidson v. Becker, 156 Ga. App. 236, 273 S.E.2d 422 (1980); Seaboard Coast

Line R.R. v. Towns, 156 Ga. App. 24, 274 S.E.2d 74 (1980); Barylak v. Jordan, 156 Ga. App. 508, 274 S.E.2d 846 (1980); Shepherd v. Shepherd, 247 Ga. 273, 275 S.E.2d 317 (1981); Garrett v. Atlantic Bank & Trust Co., 157 Ga. App. 103, 276 S.E.2d 152 (1981); Bhatia v. West Cash & Carry Bldg. Materials of Savannah, Inc., 157 Ga. App. 145, 276 S.E.2d 656 (1981); Bituminous Cas. Corp. v. Prudential Property & Cas. Ins. Co., 247 Ga. 481, 277 S.E.2d 23 (1981); Crutchfield v. Trust Co. Bank, 157 Ga. App. 557, 278 S.E.2d 138 (1981); Pharr v. Burnette, 158 Ga. App. 473, 280 S.E.2d 881 (1981); General Accident Fire & Life Assurance Corp. v. Kelch, 158 Ga. App. 555, 281 S.E.2d 258 (1981); King v. Chrisler, 160 Ga. App. 784, 287 S.E.2d 124 (1982); Edhul Co. v. Collins, 248 Ga. 611, 287 S.E.2d 216 (1981); City of Atlanta v. West, 160 Ga. App. 609, 287 S.E.2d 558 (1981); City of Atlanta v. State Farm Fire & Cas. Co., 160 Ga. App. 822, 287 S.E.2d 665 (1982); Sizemore Sec. Int'l, Inc. v. Lee, 161 Ga. App. 332, 287 S.E.2d 782 (1982); Anderson v. King, 160 Ga. App. 802, 288 S.E.2d 231 (1982); McGaha v. Kwon, 161 Ga. App. 216, 288 S.E.2d 289 (1982); Decatur Invs. Co. v. McWilliams, 162 Ga. App. 181, 290 S.E.2d 526 (1982); Williams v. Struble, 162 Ga. App. 196, 290 S.E.2d 538 (1982); Holland v. Tri-City Hosp. Auth., 162 Ga. App. 256, 291 S.E.2d 107 (1982); Cameron v. Cox, 162 Ga. App. 268, 291 S.E.2d 115 (1982); Barker v. Century 21-Atlanta E. Realty, Inc., 162 Ga. App. 828, 293 S.E.2d 76 (1982); Collier v. Cosby, Ga. App. , 293 S.E.2d 567 (1982); Freeman v. Paradise, Inc., Ga. App. , 293 S.E.2d 567 (1982); Capitol T.V. Serv., Inc. v. Derrick, 163 Ga. App. 65, 293 S.E.2d 724 (1982); Watkins v. Citizens & S. Nat'l Bank, 163 Ga. App. 468, 294 S.E.2d 703 (1982); Burleson v. Jordan, 163 Ga. App. 496, 295 S.E.2d 335 (1982); Shick Moulding & Frame Co. v. Edwards, 163 Ga. App. 879, 296 S.E.2d 161 (1982); Gates Rental, Inc. v. Perry, 164 Ga. App. 297, 297 S.E.2d 79 (1982); Mansell v. Benson Chevrolet Co., 165 Ga. App. 568, 302 S.E.2d 114 (1983); McCormick v. Clemenson, 165 Ga. App. 529, 302 S.E.2d 122 (1983); Pittard Mach. Co. v. Eisele Corp., 166 Ga. App. 324, 304 S.E.2d 129 (1983); Becker v. Fairman, 167 Ga. App. 708, 307 S.E.2d 520 (1983); Toporek v. Water Processing Co., 169 Ga. App. 141, 312 S.E.2d 132 (1983); Chatham County Comm'rs v.

Rumary, 253 Ga. 60, 315 S.E.2d 881 (1984); First of Ga. Underwriters Co. v. Beck, 170 Ga. App. 68, 316 S.E.2d 519 (1984); Kelco Roofing Co. v. Tri-D Roofing & Sheet Metal Co., 170 Ga. App. 164, 316 S.E.2d 577 (1984); Price & Sons Grading Co. v. Associated Iron & Metal Co., 171 Ga. App. 270, 319 S.E.2d 105 (1984); Crawford v. Holt, 172 Ga. App. 326, 323 S.E.2d 245 (1984); Caswell v. Pelham, 172 Ga. App. 317, 323 S.E.2d 247 (1984); Khoury v. Skidaway Island Eng'g, Inc., 172 Ga. App. 503, 323 S.E.2d 692 (1984); Brown v. WTA/CHC, Inc., 172 Ga. App. 636, 324 S.E.2d 205 (1984); Miller v. Grier, 175 Ga. App. 91, 332 S.E.2d 323 (1985); Moore v. Sanford, Adams, McCullough & Beard, 175 Ga. App. 552, 333 S.E.2d 681 (1985); Wheeler v. McDonald, 175 Ga. App. 785, 334 S.E.2d 367 (1985); Anderson v. Hendrix, 175 Ga. App. 720, 334 S.E.2d 697 (1985); Gowdey v. Rem Assocs., 176 Ga. App. 83, 335 S.E.2d 309 (1985); Murray v. Pratt-Dudley Bldrs. Supply Co., 176 Ga. App. 225, 335 S.E.2d 443 (1985); Miller v. Bank of S., 177 Ga. App. 42, 338 S.E.2d 436 (1985); Re/Max 100 of Sandy Springs, Inc. v. Tri-Continental Leasing Corp., 177 Ga. App. 111, 338 S.E.2d 542 (1985); Associated Software Consultants Org., Inc. v. Wysocki, 177 Ga. App. 135, 338 S.E.2d 679 (1985); A.P.S.S., Inc. v. Clary & Assocs., 178 Ga. App. 131, 342 S.E.2d 375 (1986); Carr v. Nodvin, 178 Ga. App. 228, 342 S.E.2d 698 (1986); Dobbs v. Titan Properties, Inc., 178 Ga. App. 389, 343 S.E.2d 419 (1986); Sadler v. Trust Co. Bank, 178 Ga. App. 871, 344 S.E.2d 694 (1986); Smith v. Pierce, 179 Ga. App. 724, 347 S.E.2d 692 (1986); Barone v. McRae & Holloway, P.C., 179 Ga. App. 812, 348 S.E.2d 320 (1986); Holcomb v. Commercial Credit Servs. Corp., 180 Ga. App. 451, 349 S.E.2d 523 (1986); Cruet v. Bovis, Kyle & Burch, 180 Ga. App. 765, 350 S.E.2d 322 (1986); Concepts, Inc. v. Innovative Property Mgt., Inc., 180 Ga. App. 903, 350 S.E.2d 805 (1986); Murray v. Stratford, 181 Ga. App. 592, 353 S.E.2d 85 (1987); Grissett v. Wilson, 181 Ga. App. 727, 353 S.E.2d 621 (1987); Vitner v. Funk, 182 Ga. App. 39, 354 S.E.2d 666 (1987); AAA Van Servs., Inc. v. Willis, 182 Ga. App. 46, 354 S.E.2d 631 (1987); Republic Ins. Co. v. Martin, 182 Ga. App. 390, 355 S.E.2d 694 (1987); Chrysler Corp. v. Marinari, 182 Ga. App. 399, 355 S.E.2d 719 (1987); Harrell v. Thompson,

182 Ga. App. 470, 356 S.E.2d 69 (1987); Caylor v. Potts, 183 Ga. App. 133, 358 S.E.2d 291 (1987); Williams v. Kaminsky, 183 Ga. App. 283, 358 S.E.2d 667 (1987); Thomas v. Bartlett, 183 Ga. App. 412, 359 S.E.2d 156 (1987); DOT v. Pilgrim, 183 Ga. App. 470, 359 S.E.2d 227 (1987); Hudson v. Omaha Indem. Co., 183 Ga. App. 847, 360 S.E.2d 406 (1987); Carpet Transp., Inc. v. Dixie Truck Tire Co., 185 Ga. App. 181, 363 S.E.2d 840 (1987); Reahard v. Ivester, 188 Ga. App. 17, 371 S.E.2d 905 (1988); Morris v. Clark, 189 Ga. App. 228, 375 S.E.2d 616 (1989); Seligman v. Milam Bldrs., Inc., 191 Ga. App. 224, 381 S.E.2d 401 (1989); Phillips v. Plymale, 191 Ga. App. 338, 381 S.E.2d 580 (1989); Hert v. Gibbs, 191 Ga. App. 471, 382 S.E.2d 191 (1989); Zorn & Son Ins. Agency, Inc. v. Jim Altman Ins., Inc., 191 Ga. App. 649, 382 S.E.2d 696 (1989); Williamson v. Ward, 192 Ga. App. 857, 386 S.E.2d 727 (1989); Johnson v. Ashkouti, 193 Ga. App. 810, 389 S.E.2d 27 (1989); Sanders v. Robertson, 196 Ga. App. 739, 397 S.E.2d 26 (1990); Williams Craft Dev., Inc. v. Vulcan Materials Co., 196 Ga. App. 703, 397 S.E.2d 122 (1990); Stevens v. McCarty, 198 Ga. App. 412, 401 S.E.2d 605 (1991); Britt v. West Coast Cycle, 198 Ga. App. 525, 402 S.E.2d 121 (1991); City Group, Inc. v. Ehlers, 198 Ga. App. 709, 402 S.E.2d 787 (1991); Smith v. Law Office of Tony Center, 198 Ga. App. 873, 403 S.E.2d 451 (1991); Spicewood, Inc. v. Dykes Paving & Constr. Co., 199 Ga. App. 165, 404 S.E.2d 305 (1991); Bi-Lo, Inc. v. McConnell, 199 Ga. App. 154, 404 S.E.2d 327 (1991); Heslen v. Heslen, 199 Ga. App. 271, 404 S.E.2d 592 (1991); Moxley v. Lariscy, 199 Ga. App. 522, 405 S.E.2d 339 (1991); Gorham v. Turner Outdoor Adv., Ltd., 199 Ga. App. 712, 405 S.E.2d 900 (1991); Covrig v. Miller, 199 Ga. App. 864, 406 S.E.2d 239 (1991); Harris v. Wilwat Properties, 201 Ga. App. 161, 410 S.E.2d 372 (1991); Crow v. Northside Bldg. Supply Co., 201 Ga. App. 441, 411 S.E.2d 914 (1991); Webb v. Sheu, 201 Ga. App. 769, 412 S.E.2d 289 (1991); Gaillard v. Coldwell Banker Residential Real Estate Servs. of Ga., Inc., 202 Ga. App. 315, 414 S.E.2d 19 (1991).

Judgment for Sum Certain

Unless there is judgment for sum certain, court cannot award damages under this section. *Collins P. & B.R.R. v. Short Elec. Ry.*, 95

Judgment for Sum Certain (Cont'd)

Ga. 570, 20 S.E. 495 (1894); Berryman v. Royston Bank, 145 Ga. 135, 88 S.E. 682 (1916).

Unless judgment for sum certain has been rendered in trial court, Supreme Court has no authority under this section to award damages in favor of defendant in error against plaintiff in error, although it might be opinion of court that cause was taken up for delay only. Jackson v. Jackson, 178 Ga. 203, 172 S.E. 459 (1934).

Motion to assess damages under section because appeal was for delay, will be denied when appeal is not from judgment for sum certain. Shepherd v. Epps, 242 Ga. 322, 249 S.E.2d 33 (1978).

Even though an appeal is taken for delay only, where the judgment is not for a sum certain, a motion for 10 percent damages must be denied. Fawcett v. Fawcett Contracting, Inc., 252 Ga. 242, 312 S.E.2d 790 (1984).

An award of damages for frivolous appeal was not an available remedy, where there had been no award of money damages in the case sub judice. Young v. First Am. Bank, 196 Ga. App. 348, 396 S.E.2d 73 (1990).

Where record fails to show any judgment, damages will not be awarded. Dozier v. Williams, 57 Ga. 600 (1876).

Section inapplicable to judgment involving validation of proposed issue of bonds. Clark v. Union School Dist., 36 Ga. App. 80, 135 S.E. 318 (1926).

Damages under section improper where judgment is refusal of interlocutory judgment and not money judgment. Pittsburg-Bartow Mining & Mfg. Co. v. Washington Trust Co., 137 Ga. 232, 73 S.E. 367 (1911).

Declaring property subject and directing that fi. fa. proceed is not judgment for sum certain. Brantly v. Buck, 62 Ga. 172 (1878).

Award of damages under section in connection with judgments requiring continuing payments. — Where judgment affirms compensation award requiring continuing payments, damages awarded under section are to be computed against only so much of award as is for sum certain; that is, 10 percent of whatever compensation is definitely ascertainable at date of judgment. Refrigerated Transp. Co. v. Kennelly, 144 Ga. App. 713, 242 S.E.2d 352 (1978).

Application**1. In General**

Applicable only to affirmed judgments for sums certain appealed for delay only. — Section is applicable only upon affirmance of judgments for sums certain, when, in opinion of court, appeal was taken for delay only. Atlanta Gas Light Co. v. Slaton, 117 Ga. App. 317, 160 S.E.2d 414 (1968).

Applies when issue appealed is without merit, not when issue tried below is nonmeritorious. Brown v. Rooks, 139 Ga. App. 770, 229 S.E.2d 548 (1976), overruled on other grounds, Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

Damages never assessed in doubtful cases. — Damages under section are in nature of a penalty, and will not be awarded in any case unless it is clearly apparent that it was brought up for delay only; and they are never assessed in doubtful cases. Lipton v. Lipton, 211 Ga. 442, 86 S.E.2d 299 (1955).

Damages against litigant for bringing case up for delay only are never assessed in doubtful cases where exceptions are at least colorable. Almond v. Bentley Gray, Inc., 138 Ga. App. 508, 226 S.E.2d 776 (1976).

Court must be fully satisfied that appeal was for delay only. — Damages will not be awarded by Court of Appeals unless court is fully satisfied that case was brought up for delay only. Diamond v. Williams, 75 Ga. App. 111, 42 S.E.2d 382 (1947); Stone v. Cook, 190 Ga. App. 11, 378 S.E.2d 142 (1989).

Where reviewing court is not fully satisfied that cause was taken up for delay only, additional damages will not be awarded. Rackard v. Merritt, 114 Ga. App. 743, 152 S.E.2d 701 (1966).

Where court is not fully convinced that case is brought up for delay only, request to award damages should be denied. Hancock v. Tifton Guano Co., 19 Ga. App. 185, 91 S.E. 246 (1917); Robinson v. Woodruff Mach. Mfg. Co., 23 Ga. App. 426, 98 S.E. 405 (1919); Majette v. Strickland, 30 Ga. App. 624, 118 S.E. 477 (1923); Royal v. Montfort & Robinson, 30 Ga. App. 780, 119 S.E. 427 (1923); Guthrie v. Rowan, 34 Ga. App. 671, 131 S.E. 93 (1925).

Sanction precluded where not meritorious but not for delay only. — Where defendant's appeal is not meritorious, but it is not so

palpably without merit as to admit of no other conclusion than that it was filed for purposes of delay, the sanction of this section is precluded. *Great Atl. & Pac. Tea Co. v. Burgess*, 157 Ga. App. 632, 278 S.E.2d 174 (1981).

Where none of the appellant's enumerations of error are meritorious, but neither are they so specious as to warrant the conclusion that the appeal is taken for the purpose of delay only, a motion for damages for a frivolous appeal is denied. *Ale-8-One of Am., Inc. v. Graphicolor Servs., Inc.*, 166 Ga. App. 506, 305 S.E.2d 14 (1983).

Lack of merit is not ordinarily a proper ground for dismissal of appeal but results in the affirmance of the trial court's judgment. *Taylor v. Bentley*, 166 Ga. App. 887, 305 S.E.2d 617 (1983).

Dismissal of appeal. — This section, authorizing 10 percent damages when a judgment is affirmed, does not expressly authorize these damages when an appeal is dismissed. *Radford v. IPD Printing & Distrib., Inc.*, 184 Ga. App. 64, 360 S.E.2d 656 (1987); *Bowles v. Lovett*, 190 Ga. App. 650, 379 S.E.2d 805 (1989); *Scott v. McLaughlin*, 192 Ga. App. 230, 384 S.E.2d 212, cert. denied, 192 Ga. App. 903, 384 S.E.2d 212 (1989); *Joyner v. Joyner*, 197 Ga. App. 304, 398 S.E.2d 294 (1990); *Royal v. Curry*, 199 Ga. App. 133, 404 S.E.2d 302 (1991).

2. When Appeal Is Frivolous

Damages granted where appellant knew appeal ill-founded. — Where it appears that appellant knew or should have known that, under a careful reading of the facts and the relevant law, his appeal was ill-founded, appellee's motion for 10 percent damages will be granted. *Ray v. Standard Fire Ins. Co.*, 168 Ga. App. 116, 308 S.E.2d 221 (1983).

The bank's motion for ten percent damages for frivolous appeal was granted. Where plaintiffs brought appeal only for purposes of delay and where there was no valid reason for plaintiffs to anticipate reversal of the trial court's judgment. *Jamison v. Button Gwinnett Sav. Bank*, 204 Ga. App. 341, 419 S.E.2d 91 (1992); *Cunningham v. Tara State Bank*, 212 Ga. App. 468, 442 S.E.2d 18 (1994).

Case without merit evidences fact that it is brought up for delay. *Chabble v. O'Neal*, 19 Ga. App. 809, 92 S.E. 288 (1917).

Where it did not appear from the facts that there was any valid reason for an appellant to anticipate reversal of the trial court's judgment, the appeal was brought only for purposes of delay, and the appellee's motion for ten percent damages for frivolous appeal was granted. *Foreman v. Eastern Foods, Inc.*, 195 Ga. App. 332, 393 S.E.2d 695 (1990); *Malin Trucking, Inc. v. Progressive Cas. Ins. Co.*, 212 Ga. App. 273, 441 S.E.2d 684 (1994).

Pure attempt to gain time is proof of delay. *Patillo v. Smith & Clifford*, 61 Ga. 265 (1878).

Failure of plaintiff in error to appear and lack of good cause for exception warrants damages. *Avera v. Vason*, 42 Ga. 233 (1871); *Craton v. Hackney*, 91 Ga. 192, 17 S.E. 124 (1893); *Bater v. Bater*, 2 Ga. App. 62, 58 S.E. 312 (1907); *Belcher v. Massey Bros.*, 8 Ga. App. 34, 68 S.E. 460 (1910).

Bringing affidavit of illegality in violation of § 9-13-121 as means of delay. — Where defendant attempts to go behind judgment by bringing affidavit of illegality in violation of § 9-13-121 and as a means of delay only, court may award damages for delay. *Drake v. Ludden & Bates S. Music House*, 46 Ga. App. 745, 169 S.E. 213 (1933).

Damages warranted where issues raised have been previously decided adversely to plaintiff in error. *Brown v. Brown*, 51 Ga. 554 (1874).

Where issues raised have been settled by previous decisions, damages under this section are appropriate. *Pinkerton & Laws Co. v. Robert & Co. Assocs.*, 129 Ga. App. 881, 201 S.E.2d 654 (1973).

Where there is no issue of fact and all questions of law raised on appeal have already been settled, so that no reason for appeal presents itself except to secure a delay in payment of debt, damages may be awarded under section. *Egerton v. Jolly*, 133 Ga. App. 805, 212 S.E.2d 462 (1975).

Second appeal, raising issues identical to those raised unsuccessfully on first appeal. — Where second appeal from order for alimony payments raised issues identical to those raised on first appeal which was decided adversely to appellant, appeal was for delay only and 10 percent damages were justified. *Maslia v. Maslia*, 243 Ga. 244, 253 S.E.2d 706 (1979).

Absent valid reason to anticipate reversal of judgment below, court may determine

Application (Cont'd)**2. When Appeal Is Frivolous (Cont'd)**

appeal is frivolous. *Hatchett v. Hatchett*, 240 Ga. 103, 239 S.E.2d 512 (1977).

Where there was no valid reason for appellant to anticipate reversal of superior court's judgment, appeal was for purpose of delay only, and appellee was entitled to award of damages in amount of 10 percent of judgment. *Hanover Ins. Co. v. Scruggs Co.*, 162 Ga. App. 640, 292 S.E.2d 493 (1982); *St. Amour v. Roberts*, 170 Ga. App. 717, 318 S.E.2d 313 (1984); *Hornsby v. Phillips*, 190 Ga. App. 335, 378 S.E.2d 870, cert. denied, 190 Ga. App. 898, 378 S.E.2d 870 (1989).

The appellee's motion for imposition of damages as sanction for filing a frivolous appeal will be granted where it appears that there was no reasonable ground upon which to anticipate reversal of the trial court's judgment and, consequently, that the appeal was brought for delay only. *Burger v. Burton*, 168 Ga. App. 378, 308 S.E.2d 868 (1983).

Where garnishee appealed default judgments with no valid reason to anticipate reversal of the judgments, and court accordingly concluded that appeal was taken up for delay only, creditors were awarded 10 percent damages. *J.E.E.H. Enters., Inc. v. Montgomery Ward & Co.*, 172 Ga. App. 58, 321 S.E.2d 800 (1984).

Penalty for frivolous appeal denied. — Motion for assessing a penalty for a frivolous appeal denied, where although there is no merit in the appeal, there is no evidence it was filed merely for the purpose of delay. *Moultrie Ins. Agency, Inc. v. Goodbar*, 203 Ga. App. 677, 417 S.E.2d 658 (1992).

Meritless argument on appeal different from trial strategy is for delay. — Where the argument raised on appeal is totally different from that argued at trial and lacks any merit whatever, the appellate court may conclude that the appeal was taken for the purpose of delay only. *Ayers v. Advertising Concepts, Inc.*, 169 Ga. App. 400, 312 S.E.2d 876 (1984).

Where appellant's liability was clear and amount of his liability was readily ascertainable, the issues raised in his appeal being meritless, a conclusion that objective of the appeal was solely to delay, making an award of damages in the amount of ten

percent of the judgment to appellees, pursuant to this section, was justified. *Karsman v. Portman*, 173 Ga. App. 108, 325 S.E.2d 608 (1984).

Motion for 10 percent damages granted. See *Petty v. Chrysler Credit Corp.*, 169 Ga. App. 418, 312 S.E.2d 874 (1984); *Bacon v. Decatur Fed. Sav. & Loan Ass'n*, 169 Ga. App. 538, 313 S.E.2d 727 (1984); *Bradbury v. Mead Corp.*, 174 Ga. App. 601, 330 S.E.2d 801 (1985); *Tiftarea Shopper, Inc. v. Maddox*, 187 Ga. App. 227, 369 S.E.2d 545 (1988); *Kennerly v. First Colony Bank*, 205 Ga. App. 352, 422 S.E.2d 243 (1992).

Appeal was held to have been palpably without merit so as to permit no conclusion other than that it was filed for purposes of delay, and appellee's motion for the imposition of ten percent damages pursuant to this section was granted. *Adams v. Cato*, 175 Ga. App. 28, 332 S.E.2d 355 (1985); *I.M.C. Motor Express, Inc. v. Cochran*, 180 Ga. App. 232, 348 S.E.2d 750 (1986); *T.L. Rogers Oil Co. v. Sommers Co.*, 203 Ga. App. 404, 417 S.E.2d 44 (1992).

3. When Appeal Not Frivolous

Even slight grounds for bringing case up will prevent award of damages for frivolous exception. *Stripling v. Calhoun*, 98 Ga. App. 354, 105 S.E.2d 923 (1958).

Presenting bona fide contest over colorable matter. — If, after reviewing whole matter, court believes that plaintiff in error is presenting bona fide contest over colorable matter, though his view of the law may not in fact be well founded, or that he is seeking a ruling upon an open or doubtful question, damages will be refused. *Prattes v. Southeast Ceramics, Inc.*, 132 Ga. App. 584, 208 S.E.2d 600 (1974).

Appeal from what is determined to be harmless error. — While assignments of error made are insufficient to bring about reversal, nevertheless counsel for losing party has absolute right to test legality of judgment, and very fact that part of charge on which error was assigned was shown to have been inexact and perhaps even error, though harmless, afforded reasonable ground for testing judgment. *Stripling v. Calhoun*, 98 Ga. App. 354, 105 S.E.2d 923 (1958).

Mere zeal and persistence of counsel for plaintiff in error will not justify damages

under section. *Walden v. Barwick*, 72 Ga. App. 545, 34 S.E.2d 552 (1945).

Where the issue was not obviously controlled by former decisions, a request for damages under this section was denied. *Aetna Ins. Co. v. Windsor*, 133 Ga. App. 159, 210 S.E.2d 373 (1974).

Reliance on grounds incorporated in prior writ of error. — Where appeal is brought on grounds which were incorporated in, or by exercise of ordinary diligence could have been and were not incorporated in prior writ of error, grant of damages to appellee under section is particularly appropriate. *Pinkerton & Laws Co. v. Robert & Co. Assocs.*, 129 Ga. App. 881, 201 S.E.2d 654 (1973).

Where appellant wrongly contends he was misled. — Where plaintiff in error bases appeal on contention that he was misled by difference between service copy of document and original, and where discovery of the fact was made in time to have presented question on prior appeal of case, and statement of plaintiff in error's brief and facts in record refute entire contention that he was misled, damages may be awarded under this section. *Rahal v. Titus*, 110 Ga. App. 122, 138 S.E.2d 68 (1964).

Where there is dismissal in appellate court, assessment of damages is not made. *James v. Seritt*, 121 Ga. App. 783, 175 S.E.2d 163 (1970).

In cases where there is dismissal in the appellate court, damages cannot be recovered in trial court because of dismissal. *James v. Seritt*, 121 Ga. App. 783, 175 S.E.2d 163 (1970).

Issues held sufficient for Court of Appeals to determine that the case was not taken up

for delay only so that appellee's motion for damages was denied. *Fleming v. Federal Land Bank*, 167 Ga. App. 326, 306 S.E.2d 332 (1983); *Carco Supply Co. v. Clem*, 194 Ga. App. 566, 391 S.E.2d 134 (1990).

Reversible error. — Where a party files a motion for damages of ten percent of a judgment for filing a frivolous appeal, such motion must be denied where reversible error is found as to a part of the original judgment. *Wisseh v. Bank of Credit & Commerce Int'l*, 173 Ga. App. 286, 325 S.E.2d 897 (1985).

Motion for damages denied. See *Ranger Constr. Co. v. Robertshaw Controls Co.*, 166 Ga. App. 679, 305 S.E.2d 361 (1983); *Hillis v. First Nat'l Bank*, 168 Ga. App. 408, 309 S.E.2d 404 (1983); *Gateway Leasing Corp. v. Heath*, 168 Ga. App. 858, 310 S.E.2d 549 (1983); *Glenn v. Fourteen W. Realty, Inc.*, 169 Ga. App. 549, 313 S.E.2d 730 (1984); *Macon-Bibb County Hosp. Auth. v. Miller*, 180 Ga. App. 231, 348 S.E.2d 752 (1986); *New York Ins. Co. v. Willett*, 183 Ga. App. 767, 360 S.E.2d 37 (1987); *Farmers Mut. Ins. Ass'n v. Brown*, 183 Ga. App. 810, 360 S.E.2d 42 (1987); *Glenridge Unit Owners Ass'n v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987); *Casgar v. Citizens & S. Nat'l Bank*, 188 Ga. App. 234, 372 S.E.2d 815 (1988); *Dever v. Lee*, 188 Ga. App. 483, 373 S.E.2d 224 (1988); *Nabisco Brands, Inc. v. Huggins*, 190 Ga. App. 664, 379 S.E.2d 630 (1989); *Hunter v. Hardnett*, 199 Ga. App. 443, 405 S.E.2d 286 (1991), cert. denied, 199 Ga. App. 906, 405 S.E.2d 286 (1991); *Pulliam v. Nichols*, 202 Ga. App. 95, 413 S.E.2d 215 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, § 1024.

C.J.S. — 5 C.J.S., Appeal and Error, § 1364.

ALR. — Award of damages for dilatory tactics in prosecuting appeal in state court, 91 ALR3d 661.

5-6-7. No decisions to be rendered ore tenus; publication of judgments and opinions.

No decision shall be rendered ore tenus. The reporter shall publish in the official reports of the Supreme Court and the Court of Appeals all judgments, but only those opinions which the courts shall direct to be

published. (Ga. L. 1866, p. 46, § 5; Code 1868, § 4210; Code 1873, § 4270; Code 1882, § 4270; Civil Code 1895, § 5583; Civil Code 1910, § 6202; Code 1933, § 6-1606; Ga. L. 1966, p. 493, § 9.)

Cross references. — Motions for rehearing, Rules of the Court of Appeals of the State of Georgia, Rule 48.

Law reviews. — For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966).

For comment discussing the operation of stare decisis, in light of *Walton v. Benton*, 191 Ga. 548, 13 S.E.2d 185 (1941), see 3 Ga. B.J. 62 (1941).

JUDICIAL DECISIONS

Cited in *Rayle v. Bennet*, 173 Ga. 897, 162 S.E. 267 (1931); *Trammell v. Atlanta Coach Co.*, 51 Ga. App. 705, 181 S.E. 315 (1935); *Smith v. State*, 196 Ga. 595, 27 S.E.2d 369 (1943).

5-6-8. Entry of decision on minutes; directions to lower court.

The decision in each case shall be entered on the minutes. It shall be within the power of the appellate court rendering the decision in a case to make such order and to give such direction as to the final disposition of the case by the lower court as may be consistent with the law and justice of the case. (Orig. Code 1863, § 4180; Code 1868, § 4219; Code 1873, § 4284; Code 1882, § 4284; Civil Code 1895, § 5586; Penal Code 1895, § 1068; Civil Code 1910, § 6205; Penal Code 1910, § 1095; Code 1933, § 6-1610.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICATION

1. IN GENERAL
2. DIRECTION ALLOWING AMENDMENT TO PETITION OR APPEAL
3. DIRECTIONS TO WRITE OFF PART OF VERDICT

General Consideration

One great purpose in establishing Supreme Court (or Court of Appeals) was to terminate suits, and with this view, it is made its duty not only to grant judgments of affirmance or reversal, but any other order, direction or decree required, and if necessary to make final disposition of cause, and it is empowered to give to cause in court below such direction as may be consistent with law and justice of case. *Gray v. Watson*, 54 Ga. App. 885, 189 S.E. 616 (1936).

Court of Appeals has both inherent and express powers to prevent unjust results. *Peace Officers' Annuity & Benefit Fund v.*

Blocker, 135 Ga. App. 822, 219 S.E.2d 456 (1975).

Section applies to appellate courts, rather than trial judges when considering motions for new trial. *McDonald v. McDonald*, 229 Ga. 702, 194 S.E.2d 429 (1973).

Where lower court fails to, or improperly exercises discretion. — Power to direct specific, final disposition of case will not be exercised unless discretion of lower court has been improperly used or not exercised at all. *Finley v. Southern Ry.*, 5 Ga. App. 722, 64 S.E. 312 (1909).

Superior court cannot modify Supreme Court's direction to amend its decree. — Where in affirming judgment, Supreme

Court gives direction to trial court to amend its decree in certain specified manner, trial court on receipt of remittitur has no power or discretion to vary or modify direction given, but must enter judgment in conformity with instructions contained therein. *Estes v. Estes*, 206 Ga. 530, 57 S.E.2d 587 (1950); *Akins v. State*, 237 Ga. 826, 229 S.E.2d 645 (1976).

Cited in *Central R.R. & Banking Co. v. Kent*, 91 Ga. 687, 18 S.E. 850 (1893); *Gibson v. Wilkins, Neely & Jones*, 110 Ga. 93, 35 S.E. 316 (1900); *Fricker v. Americus Mfg. & Imp. Co.*, 124 Ga. 165, 52 S.E. 65 (1905); *Massachusetts Bonding & Ins. Co. v. Realty Trust Co.*, 139 Ga. 180, 77 S.E. 86 (1913); *Atlantic Ice & Coal Corp. v. Town of Decatur*, 154 Ga. 882, 115 S.E. 912 (1923); *Jolly v. Catoosa County Bd. of Educ.*, 171 Ga. 193, 154 S.E. 788 (1930); *Burkhalter v. De Loach*, 171 Ga. 384, 155 S.E. 513 (1930); *McRae v. Atlanta Title & Trust Co.*, 42 Ga. App. 656, 157 S.E. 231 (1931); *Wilson v. State*, 173 Ga. 275, 160 S.E. 319 (1931); *Tinsley v. Maddox*, 176 Ga. 471, 168 S.E. 297 (1933); *Irons v. American Nat'l Bank*, 178 Ga. 160, 172 S.E. 629 (1933); *Davis v. Metropolitan Life Ins. Co.*, 148 Ga. App. 179, 172 S.E. 467 (1934); *Gibbs v. Georgia S. & F. Ry.*, 49 Ga. App. 565, 176 S.E. 648 (1934); *Douglas v. Austin-Western Rd. Mach. Co.*, 180 Ga. 29, 177 S.E. 912 (1934); *Smith v. Bailey*, 183 Ga. 869, 189 S.E. 905 (1937); *Pope v. United States Fid. & Guar. Co.*, 193 Ga. 769, 20 S.E.2d 13 (1942); *Davis v. Wright*, 194 Ga. 1, 21 S.E.2d 88 (1942); *Hadden v. Fuqua*, 194 Ga. 621, 22 S.E.2d 377 (1942); *Ross v. Rambo*, 195 Ga. 100, 23 S.E.2d 687 (1942); *Singleton v. State*, 196 Ga. 136, 26 S.E.2d 736 (1943); *Reese v. Baker*, 197 Ga. 265, 29 S.E.2d 412 (1944); *Parks v. State*, 206 Ga. 675, 58 S.E.2d 142 (1950); *American Airmotive Co. v. Meyer*, 81 Ga. App. 554, 59 S.E.2d 514 (1950); *McKoy v. Smith*, 82 Ga. App. 645, 61 S.E.2d 926 (1950); *Seymour v. Seymour*, 210 Ga. 49, 77 S.E.2d 433 (1953); *Parks v. Parks*, 89 Ga. App. 725, 80 S.E.2d 837 (1954); *McLaurin v. Henry*, 90 Ga. App. 864, 84 S.E.2d 713 (1954); *Carter v. State*, 93 Ga. App. 12, 90 S.E.2d 672 (1955); *Taylor v. Atlanta Gas Light Co.*, 93 Ga. App. 766, 92 S.E.2d 709 (1956); *Jackson v. Jackson*, 214 Ga. 746, 107 S.E.2d 833 (1959); *Brown v. Goodloe*, 215 Ga. 755, 113 S.E.2d 393 (1960); *Cauble v. Weimer*, 101 Ga. App. 313, 113 S.E.2d 641

(1960); *McEntyre v. Clack*, 104 Ga. App. 646, 122 S.E.2d 595 (1961); *Turner v. McGee*, 217 Ga. 769, 125 S.E.2d 36 (1962); *Almon v. Citizens & S. Nat'l Bank*, 108 Ga. App. 799, 134 S.E.2d 435 (1963); *Whiten v. Orr Constr. Co.*, 109 Ga. App. 267, 136 S.E.2d 136 (1964); *McCurry v. McCurry*, 223 Ga. 334, 155 S.E.2d 378 (1967); *Woods v. State*, 117 Ga. App. 546, 160 S.E.2d 922 (1968); *Miller v. State*, 224 Ga. 627, 163 S.E.2d 730 (1968); *Massey v. Smith*, 224 Ga. 721, 164 S.E.2d 786 (1968); *T.K. v. State*, 126 Ga. App. 269, 190 S.E.2d 588 (1972); *Camp v. Fidelity Bankers Life Ins. Co.*, 129 Ga. App. 590, 200 S.E.2d 332 (1973); *Davey v. City of Atlanta*, 130 Ga. App. 687, 204 S.E.2d 322 (1974); *United Family Life Ins. Co. v. DeKalb County*, 134 Ga. App. 1, 213 S.E.2d 123 (1975); *Travelers Indem. Co. v. Sasser & Co.*, 138 Ga. App. 361, 226 S.E.2d 121 (1976); *Swish Mfg. S.E., Inc. v. Wilkie*, 158 Ga. App. 275, 279 S.E.2d 724 (1981); *Mijajlovic v. State*, 179 Ga. App. 506, 347 S.E.2d 325 (1986); *Thomas v. Clark*, 188 Ga. App. 606, 373 S.E.2d 668 (1988); *Baxter v. Kemp*, 260 Ga. 184, 391 S.E.2d 754 (1990); *Wisembaker v. Warren*, 196 Ga. App. 551, 396 S.E.2d 528 (1990).

Application

1. In General

Supreme Court has power to give direction to court below such as ordering affirmance of alimony award if lump sum payment was written off. *Weatherford v. Weatherford*, 204 Ga. 553, 50 S.E.2d 323 (1948).

Nature of allowable direction. — Appellate courts may give such direction to cause as is consistent with law and justice. *Mollins v. State*, 122 Ga. App. 865, 179 S.E.2d 111 (1970).

Reversal where appellants file separate motions. — Appellate court can reverse judgment as to one defendant only where appellants themselves separate their cause by filing separate motions for new trial and coming to court on separate bills of exceptions (see §§ 5-6-49, 5-6-50). *Gray v. Watson*, 54 Ga. App. 885, 189 S.E. 616 (1936).

Appellate court can reverse as to only one defendant upon joint motion for new trial. *Gray v. Watson*, 54 Ga. App. 885, 189 S.E. 616 (1936).

Application (Cont'd)**1. In General (Cont'd)**

Direction that government agent be made party defendant is allowable. *Payne v. Hayes*, 25 Ga. App. 730, 104 S.E. 917 (1920).

Leave to amend in respect to multifariousness is allowable under section. *Whatley v. Cohen & Co.*, 24 Ga. App. 514, 101 S.E. 310 (1919).

Direction allowing acceptance of nonsuit (now dismissal) on payment of costs is proper. *Etowah Mfg. Co. v. Alford*, 78 Ga. 345 (1886).

Direction may be to enter judgment of nonsuit (now dismissal) after setting aside verdict and judgment. *Ayer v. Chapman*, 141 Ga. 377, 81 S.E. 198 (1914).

Direction may be given to set aside verdict in main suit and to reinstate case. *James v. Steele*, 147 Ga. 598, 95 S.E. 11 (1918).

Where it appears plaintiff cannot show materially different state of facts, direction to dismiss is proper. *Central R.R. & Banking Co. v. Kent*, 91 Ga. 687, 18 S.E. 850 (1893).

Direction may be given resubmitting issues to jury. *Adair v. St. Amand*, 136 Ga. 1, 70 S.E. 578 (1911).

Issues may be restricted and direction given for summary disposition of question remaining in case. *Fudge v. Kelly*, 6 Ga. App. 5, 64 S.E. 316 (1909).

Directions are sometimes given limiting issue of another trial. *Zellars v. Orr*, 147 Ga. 607, 95 S.E. 6 (1918); *Fraser v. Jarrett*, 153 Ga. 441, 112 S.E. 487 (1922).

Court may direct that affirmation shall not prejudice plaintiffs' right to present another application for injunction. *Sims v. Cordele Ice Co.*, 119 Ga. 597, 46 S.E. 841 (1904).

Court may direct that judge presiding at retrial render proper judgment as to costs. *Peebles v. McCrary*, 28 Ga. App. 716, 113 S.E. 233 (1922).

Judgment may be affirmed in part and reversed in part, with direction to tax costs against plaintiff in error. *Columbus Power Co. v. Puckett*, 24 Ga. App. 390, 100 S.E. 800 (1919).

Direction may be made to correct miscalculated interest and attorney's fees. *Fisher v. Shands*, 24 Ga. App. 743, 102 S.E. 190 (1920).

Prevention of binding effect on subsequent action of motion to dismiss. — Direc-

tion may be given that judgment on certain grounds of demurrer (now motion to dismiss) should not be binding on parties in subsequent action. *Styles v. American Home Ins. Co.*, 146 Ga. 92, 90 S.E. 718 (1916).

Supreme Court's affirmance, without condition or direction, of dismissal by superior court. — After general demurrer (now motion to dismiss) to declaration has been sustained and cause dismissed by superior court, and that judgment affirmed in Supreme Court without condition or direction, declaration is not amendable. *McRae v. Sears*, 183 Ga. 133, 187 S.E. 664 (1936).

Remand for findings as to counterclaims. — Where Supreme Court has overruled lower court's decision on certain counterclaims and remanded case for findings of fact with respect to those counterclaims, in event that defendant establishes any of the counterclaims, judgment against him should be modified accordingly. *Jones v. J.S.H. Co.*, 199 Ga. 755, 35 S.E.2d 288 (1945).

Vacating verdict and substituting judgment of nonsuit (now dismissal). — Where plaintiffs failed to prove case, judgment overruling motion for new trial will not be reversed, but, in exercise of power possessed by Supreme Court under this section, direction may be given that plaintiffs have leave to vacate verdict and to substitute therefor judgment of nonsuit in lieu of judgment entered on verdict. *Lewis v. Bowen*, 208 Ga. 671, 68 S.E.2d 900 (1952).

2. Direction Allowing Amendment to Petition or Appeal

Directions may be awarded allowing amendments to petitions. *Jones v. Hurst*, 95 Ga. 286, 22 S.E. 122 (1895); *Ferrell v. Greenway & Co.*, 157 Ga. 535, 122 S.E. 198 (1924).

Direction may permit amendment by petitioner and require notice to defendant. *Brown v. Tyson*, 150 Ga. 598, 104 S.E. 420 (1920).

Amendment may be required to set up jurisdictional facts. *Burton v. Wadley S. Ry.*, 25 Ga. App. 599, 103 S.E. 881 (1920).

Direction may allow amendment to add parties to petition. *Green & Colwell v. Hill*, 101 Ga. 258, 28 S.E. 692 (1897); *Robinson v. Central of Ga. Ry.*, 25 Ga. App. 507, 103 S.E. 737 (1920); *Payne v. Hayes*, 25 Ga. App. 730, 104 S.E. 917 (1920).

Direction may allow amendment adding parties as complainants to bill in equity. *Hayes v. Farmer*, 58 Ga. 324 (1877).

Amendment to dismiss party improperly joined may be directed or allowed. *Charleston & W.C. Ry. v. McElmurray*, 16 Ga. App. 504, 85 S.E. 804 (1915).

Direction may be made allowing party to amend appeal. *Holston Box & Lumber Co. v. Holcomb*, 30 Ga. App. 651, 118 S.E. 577 (1923).

3. Directions to Write Off Part of Verdict

Judgment may be affirmed with direction to write off an amount from judgment. *Tift v. Shiver & Aultman*, 24 Ga. App. 638, 102 S.E. 47 (1919).

Affirmance on condition that amount be written off from judgment is proper. *Ellard v. Smith*, 145 Ga. 262, 88 S.E. 932 (1916); *Short & Co. v. Lynchburg Shoe Co.*, 145 Ga. 375, 89 S.E. 333 (1916).

Conditioning on plaintiff's remitting part of verdict and dismissing action as to defendant. — It has been held that a case may be reversed, but if plaintiff remits part of verdict, and dismisses action as to defendants, judgment shall stand affirmed against defendant. *Davis v. Gurley*, 51 Ga. 74 (1874).

Affirmance may be on condition that damages and attorney's fees be written off. *Southern States Life Ins. Co. v. Morris*, 24 Ga. App. 746, 102 S.E. 179 (1920).

There may be direction that amount inadvertently entered be written off. *Drew v. Drew*, 25 Ga. App. 355, 103 S.E. 196 (1920).

There may be direction that illegal part of verdict be written off. *Tice Co. v. Evans*, 32 Ga. App. 385, 123 S.E. 742 (1924).

Erroneous verdict may be corrected by writing off of illegal part if separable from the rest. *Coop. Cab Co. v. Arnold*, 106 Ga. App. 160, 126 S.E.2d 689 (1962).

Directing new trial as to damages if plaintiff refuses to write off. — Where, in suit seeking injunction to prevent cutting of timber and for damages to realty, jury found that plaintiff was entitled to injunction, and also damages in a stated amount, and case was reversed on condition, solely because of erroneous ruling as to measure of damages, Supreme Court may in exercise of power conferred on it under section, direct that if plaintiff will not elect to write off certain amount of damages, new trial shall be limited to inquiry as to measure of damages. *Holcombe v. Jones*, 197 Ga. 825, 30 S.E.2d 903 (1944).

RESEARCH REFERENCES

C.J.S. — 5 C.J.S., Appeal and Error, §§ 935-944, 962-967.

5-6-9. Transmittal of opinion to lower court generally.

(a) Where a further hearing of the case is to follow in the lower court, the clerk of the appellate court shall transmit a copy of the opinion to the clerk of the lower court, without charge, as soon as the opinion is written out. The copy shall remain on file for the information of the court and the parties.

(b) The appellate court, on rendering its decision in any case, shall instruct the clerk whether the case comes within the terms of this Code section; and a note of such instructions shall be entered on the minutes of the court. (Ga. L. 1887, p. 106, §§ 1, 2; Civil Code 1895, §§ 5595, 5596; Civil Code 1910, §§ 6214, 6215; Code 1933, §§ 6-1802, 6-1803; Ga. L. 1982, p. 3, § 5.)

Cross references. — Transmittal of remittitur, Rules of the Court of Appeals of the State of Georgia, Rule 49.

JUDICIAL DECISIONS

Filing of remittitur merely annuls and vacates orders which have been reversed, leaving examiner's report standing as before, and restoring exceptions to their original status — neither sustained nor overruled, but ripe for disposition according to law. *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939).

Effect of reversal by Supreme Court is to place case where it stood prior thereto; and thereafter trial court should enter order sustaining exceptions of law, and a finding sustaining exceptions of fact where jury trial not demanded. *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939).

5-6-10. Transmittal of remittitur to lower court generally.

The decision of the appellate court and any direction awarded in the case shall be certified by the clerk to the court below, under the seal of the court. The decision and direction shall be respected and carried into full effect in good faith by the court below. The remittitur shall contain nothing more, except the costs paid in the appellate court. (Laws 1845, Cobb's 1851 Digest, p. 450; Laws 1850, Cobb's 1851 Digest, p. 455; Code 1863, § 4181; Code 1868, § 4220; Code 1873, § 4285; Code 1882, § 4285; Civil Code 1895, § 5597; Civil Code 1910, § 6216; Code 1933, § 6-1804.)

Cross references. — Filing of remittitur and judgment, Uniform Superior Court Rules, Rule 38.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EFFECT OF AFFIRMANCE

EFFECT OF REVERSAL

General Consideration

Court of Appeals opinions binding on trial court. — A trial court, regardless of its good intentions, cannot decide to disregard the opinions of the Court of Appeals. *Easigate Assocs. v. Piggly Wiggly S., Inc.*, 200 Ga. App. 872, 410 S.E.2d 129, cert. denied, 200 Ga. App. 896, 410 S.E.2d 129 (1991).

Second appeal cannot enlarge scope of first appeal. — A party cannot, on a second appeal, by challenging the judgment entered on remittitur, enlarge the scope of the previous appeal. *Womack Indus., Inc. v. B & A Equip. Co.*, 204 Ga. App. 32, 418 S.E.2d 411 (1992).

Remittitur, whenever presented, is proper evidence to court below of decision of Supreme Court, and decision thus evidenced is to be respected and in good faith carried into effect. *Hartley v. Hartley*, 212 Ga. 62, 90 S.E.2d 555 (1955).

Cases are "sent back" to trial court by transmittal and filing of remittitur in clerk's office. *Hagan v. Robert & Co. Assocs.*, 222 Ga. 469, 150 S.E.2d 663 (1966).

Filing of remittitur immediately reestablishes jurisdiction. — The filing of a remittitur in the office of the clerk of a trial court immediately reinvests it with jurisdiction for all purposes over the case to which

such remittitur relates, though good practice requires that the trial court cause the remittitur to be entered upon its minutes. *Chambers v. State*, 262 Ga. 200, 415 S.E.2d 643 (1992).

Carrying remittitur into effect is not discretionary with presiding judge, but is a matter of statutory mandate and compulsion. *Hartley v. Hartley*, 212 Ga. 62, 90 S.E.2d 555 (1955).

Trial court cannot vary or modify direction given. — Where in affirming judgment, Supreme Court gives direction to trial court to amend its decree in certain specified manner, trial court on receipt of remittitur has no power or discretion to vary or modify direction given, but must enter judgment in compliance with instructions contained therein. *Estes v. Estes*, 206 Ga. 530, 57 S.E.2d 587 (1950); *Akins v. State*, 237 Ga. 826, 229 S.E.2d 645 (1976).

Superior court order making judgment of Georgia Supreme Court its own judgment closes state suit. *Giordano v. Stubbs*, 356 F. Supp. 1041 (N.D. Ga.), *aff'd*, 483 F.2d 1395 (5th Cir. 1973).

New hearing cannot be had before remittitur from appellate court is filed in lower court. *Lyon v. Lyon*, 103 Ga. 747, 30 S.E. 575 (1898).

As to effect of loss of remittitur before entry on minutes of lower court, see *Jones v. State*, 67 Ga. 240 (1881).

Awarding costs upon return of remittitur which makes no reference to costs. — It is within supreme jurisdiction of judge of superior court, upon return of remittitur in case brought by bill of exceptions (see §§ 5-6-49 and 5-6-50) to Supreme Court, and in which no reference is made to subject of costs in cases to incorporate in judgment costs allowed by law as costs in Supreme Court, as well as costs of officers of superior court for their services in transmission of bill of exceptions and transcript of record to Supreme Court. *Anderson v. Beasley*, 169 Ga. 720, 151 S.E. 360 (1930).

Effect of failure to file appellate court's order. — When the trial court which originally reentered summary judgment lacks jurisdiction over the case, the remittitur of the appellate court remanding for the entry of a new order not having been filed with the clerk of the lower court, the trial court's order is a nullity. *Talley v. City Tank Corp.*, 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Trial court was without jurisdiction to order defendant to appear for trial where remittitur had not been filed. *Nave v. State*, 171 Ga. App. 165, 318 S.E.2d 753 (1984).

Cited in *Hadden v. Fuqua*, 194 Ga. 621, 22 S.E.2d 377 (1942); *Gay v. Crockett*, 219 Ga. 248, 132 S.E.2d 673 (1963); *Rahal v. Titus*, 110 Ga. App. 122, 138 S.E.2d 68 (1964); *Stone v. Peoples Bank*, 128 Ga. App. 796, 197 S.E.2d 925 (1973); *Summer-Minter & Assocs. v. Giordano*, 231 Ga. 601, 203 S.E.2d 173 (1974); *Ansley v. Atlanta Suburbia Estates, Ltd.*, 231 Ga. 640, 203 S.E.2d 861 (1974); *Keener v. MacDougall*, 233 Ga. 881, 213 S.E.2d 835 (1975); *Ellington v. Tolar Constr. Co.*, 142 Ga. App. 218, 235 S.E.2d 729 (1977).

Effect of Affirmance

Affirmance denies trial court jurisdiction to grant new trial. — Where judgment was entered for the plaintiff, who then filed a notice of appeal, and the defendant then filed a cross appeal as well as a motion for new trial in the trial court, and the Court of Appeals then affirmed the trial court's judgment, the trial court could not reassert its jurisdiction and grant a new trial to the defendant. The fact that the case made its way through the appeal processes of the Court of Appeals effectively cut off the defendant's right to pursue its motion for a new trial. Thus, the proper means of placing this issue before the appellate court would be to file a motion for a stay of the direct appeal with the Court of Appeals, and if the stay is denied, then to petition for writ of certiorari. *Housing Auth. v. Van Geeter*, 252 Ga. 196, 312 S.E.2d 309 (1984).

Upon affirmance of trial court's final judgment, rights involved are conclusively adjudicated. — When final judgment of trial court is affirmed by Supreme Court, and not remanded to trial court for further proceedings, controversy is at an end; rights of parties, so far as they are involved in litigation, are conclusively adjudicated. *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry*, 219 Ga. 856, 136 S.E.2d 371 (1964).

Affirmance without remand gives judgment full effect. — When final judgment of trial court is affirmed on appeal, and not remanded to trial court, further proceedings on case in appellate court and in trial court

Effect of Affirmance (Cont'd)

are precluded and judgment of lower court is in full force and effect, precisely the same as if no appeal had been taken. *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry*, 219 Ga. 856, 136 S.E.2d 371 (1964).

After affirmance of final decree trial court cannot entertain ex parte motions to alter decree. — Affirmance of final decree of trial court by Supreme Court without condition or direction leaves trial court on return of remittitur without jurisdiction to entertain or pass upon ex parte motion to add to or amend decree. *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry*, 219 Ga. 856, 136 S.E.2d 371 (1964).

Effect of Reversal

Reversal without direction results in vacation of judgment and trial de novo. *Worley v. Travelers Indem. Co.*, 121 Ga. App. 179, 173 S.E.2d 248 (1970).

Judgment of reversal, without more, operates only to vacate orders and decree as therein stated, and to reinvest trial court with jurisdiction, on filing of remittitur in office of clerk of trial court. It neither serves as a substitute for findings for appellant, nor enlarges powers of trial judge in reference thereto. *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939).

Effect of reversal by Supreme Court is to place case where it stood prior thereto; and thereafter trial court should enter order sustaining exceptions of law, and a finding sustaining exceptions of fact where jury trial not demanded. *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939).

Filing of remittitur merely annuls and vacates orders which have been reversed, leaving examiner's report standing as before, and restoring exceptions to their original status — neither sustained nor overruled, but ripe for disposition according to law. *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939).

Lower court's entry of judgment on remittitur reversing denial of dispositive mo-

tion. — If appellate court has reversed lower court's denial of motion dispositive of case — such as motion to dismiss or motion for summary judgment — entry by lower court of judgment on remittitur constitutes final judgment and terminates case, whereas generally in all other situations case continues in lower court until final judgment. *Giordano v. Stubbs*, 356 F. Supp. 1041 (N.D. Ga.), *aff'd*, 483 F.2d 1395 (5th Cir. 1973).

Where the lower court has entered a judgment on remittitur reversing the denial of a dispositive motion, the judgment on remittitur is dispositive and losing party cannot amend or dismiss. *Giordano v. Stubbs*, 356 F. Supp. 1041 (N.D. Ga.), *aff'd*, 483 F.2d 1395 (5th Cir. 1973).

Judgment on remittitur reversing decree not dispositive of case. — Where appellate court reverses lower court's decree which was not dispositive of case, and further findings of fact and conclusions of law are necessary, party which loses on appeal may amend pleadings or dismiss case even after entry by lower court of judgment on remittitur. *Giordano v. Stubbs*, 356 F. Supp. 1041 (N.D. Ga.), *aff'd*, 483 F.2d 1395 (5th Cir. 1973).

Where appellate court reverses lower court's denial of motion dispositive of case and transmits remittitur back to lower court, before entry by lower court of judgment on remittitur party that lost on appeal can amend its pleadings, or can even dismiss case entirely. *Giordano v. Stubbs*, 356 F. Supp. 1041 (N.D. Ga.), *aff'd*, 483 F.2d 1395 (5th Cir. 1973).

Effect of reversal of trial court's sustaining of motion to vacate judgment. — Where trial court, after hearing motion to set aside prior order in pending case vacates judgment complained of, and on appeal trial court's decision is reversed without direction, judgment of appellate court is final. Upon remittitur from appellate court being filed in trial court, issue is *res judicata*, and lower court has no authority to allow movant to amend his motion. Nor can it hear further evidence or consider any other matter that would otherwise affect finality of judgment of Supreme Court. *Shepherd v. Shepherd*, 243 Ga. 253, 253 S.E.2d 696 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, §§ 989-996.

C.J.S. — 5 C.J.S., Appeal and Error, §§ 968-972.

ALR. — Remittitur on which court has conditioned refusal of new trial or reversal, as inuring to benefit of codefendant failing to move for new trial or to appeal, 160 ALR 984.

Appellate court's power to order remittitur of portion of actual damages awarded at trial while sustaining trial award of punitive damages, 97 ALR2d 1145.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

5-6-11. Issuance of remittitur in cases involving death penalty.

In all cases where the Supreme Court of Georgia has affirmed the imposition of the death penalty in a case or has affirmed the denial of a petition for a writ of habeas corpus in any case in which the death penalty has been imposed, the remittitur shall not issue from that court for at least 90 days from the date of the court's decision, or from the date of the court's denial of a motion for a rehearing, if such motion is timely filed, whichever is later; provided, however, that this Code section shall not apply where the defendant has previously applied for a writ of habeas corpus which has been denied and the denial thereof has been affirmed by the Supreme Court of Georgia, or where the writ has been granted but the grant thereof has been reversed by the Supreme Court of Georgia. (Ga. L. 1970, p. 691, § 1; Ga. L. 1971, p. 212, § 1.)

Cross references. — Habeas corpus procedure for persons under sentence of state court of record, § 9-14-40 et seq. Review of death sentences by Supreme Court, § 17-10-35 et seq. Transmittal of remittiturs,

Rules of the Supreme Court of the State of Georgia, Rule 60. Filing of remittitur and judgment, Uniform Superior Court Rules, Rule 38.

5-6-12. Cessation of supersedeas and issuance of execution upon affirmation of judgment of lower court.

If the judgment of the lower court is affirmed, upon the filing of the remittitur with the clerk of the court below, the supersedeas shall cease and execution shall issue at once for the amount of the original judgment. (Orig. Code 1863, § 4183; Code 1868, § 4222; Code 1873, § 4287; Code 1882, § 4287; Civil Code 1895, § 5598; Civil Code 1910, § 6217; Code 1933, § 6-1805.)

Cross references. — Supersedeas, Rules of the Supreme Court of the State of Georgia,

Rule 12. Supersedeas, Rules of the Court of Appeals of the State of Georgia, Rule 50.

JUDICIAL DECISIONS

Supersedeas deprives trial court of jurisdiction to take further proceedings towards

enforcing judgment excepted to. *Tanner v. Wilson*, 184 Ga. 628, 192 S.E. 425 (1937).

What is lawfully done before supersedeas is granted or becomes effective is valid and stands, but anything done thereafter is unauthorized and must be set aside. *Tanner v. Wilson*, 184 Ga. 628, 192 S.E. 425 (1937).

Running of statute of limitations upon enforcement of judgments. — See *Copeland*

v. Pope, 90 Ga. App. 304, 83 S.E.2d 40 (1954).

Cited in Equity Life Ass'n v. Gammon, 119 Ga. 271, 46 S.E. 100 (1903); *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939); *Bird v. Riggs*, 210 Ga. 297, 79 S.E.2d 803 (1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, §§ 931-936.

C.J.S. — 5 C.J.S., Appeal and Error, § 889.

ALR. — Amount named in appeal or supersedeas bond as the maximum limit of sureties' liability or as a limitation of the

amount which they undertake shall be paid on the judgment appealed from, 87 ALR 257.

Effect of supersedeas or stay on antecedent levy, 90 ALR2d 483.

5-6-13. Granting of supersedeas in cases of contempt.

(a) A judge of any trial court or tribunal having the power to adjudge and punish for contempt shall grant to any person convicted of or adjudged to be in contempt of court a supersedeas upon application and compliance with the provisions of law as to appeal and certiorari, where the person also submits, within the time prescribed by law, written notice that he intends to seek review of the conviction or adjudication of contempt. It shall not be in the discretion of any trial court judge to grant or refuse a supersedeas in cases of contempt.

(b) This Code section shall not apply to contempt in the presence of the court during the progress of a proceeding. (Ga. L. 1939, p. 260, § 1.)

Cross references. — Supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12. Supersedeas, Rules of the Court of Appeals of the State of Georgia, Rule 50.

Law reviews. — For article, "Jury Trials in Contempt Cases," see 20 Ga. B.J. 297 (1957).

JUDICIAL DECISIONS

Grant of supersedeas is mandatory upon giving of required notice. — Under subsection (a), one adjudged in contempt is entitled as a matter of right to a supersedeas upon written notice that he intends to except to court's judgment. *Cody v. Cody*, 221 Ga. 677, 146 S.E.2d 778 (1966).

Subsection (b) does not preclude review of judgments within its scope. — While grant of supersedeas for contempt committed in presence of court is a matter within

sound discretion of trial court before whom contempt is committed, and while person so held is not as a matter of right entitled to a hearing, such judgment of trial court is nevertheless reviewable by Court of Appeals. *Garland v. Tanksley*, 99 Ga. App. 201, 107 S.E.2d 866 (1959).

Cited in *Smith v. Smith*, 224 Ga. 689, 164 S.E.2d 225 (1968); *Calvert Enters., Inc. v. Griffin-Spalding County Hosp. Auth.*, 197 Ga. App. 727, 399 S.E.2d 287 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 168-171, 364-373.

C.J.S. — 17 C.J.S., Contempt, §§ 112-114, 121.

5-6-14. Execution of extraordinary orders of Supreme Court.

When judgments are rendered in the Supreme Court in injunction or other extraordinary cases, the judges of the superior courts may give immediate effect to such judgments. (Ga. L. 1870, p. 405, § 5; Code 1873, § 3215; Code 1882, § 3215; Civil Code 1895, § 5599; Civil Code 1910, § 6218; Code 1933, § 6-1806.)

Cross references. — Supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12.

JUDICIAL DECISIONS

Where injunction is denied, execution may proceed upon filing of remittitur in clerk's office below. *Brown v. Wilson*, 59 Ga. 604 (1877).

Interlocutory hearing in injunction pro-

ceedings cannot be had until remittitur reversing judgment is filed in office of clerk below. *Lyon v. Lyon*, 103 Ga. 747, 30 S.E. 575 (1898).

5-6-15. Certiorari from Supreme Court to Court of Appeals.

The writ of certiorari shall lie from the Supreme Court to the Court of Appeals as provided by Article VI, Section VI, Paragraph V of the Constitution of this state. (Orig. Code 1863, § 3957; Code 1868, § 3977; Code 1873, § 4049; Code 1882, § 4049; Civil Code 1895, § 4634; Civil Code 1910, § 5180; Code 1933, § 19-101; Ga. L. 1983, p. 3, § 47.)

Cross references. — Certiorari to the Court of Appeals, Rules of the Supreme Court of the State of Georgia, Rules 28 — 36.

Applications, how made, Rules of the Court of Appeals of the State of Georgia, Rule 16.

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Cited in *Daniels v. Commissioners of Piltage*, 147 Ga. 295, 93 S.E. 887 (1917); *McDonald v. Georgia Fed'n of Labor*, 178 Ga. 313, 173 S.E. 662 (1933); *Gullatt v. Slaton*, 189 Ga. 758, 8 S.E.2d 47 (1940); *Butler v. City of Dublin*, 191 Ga. 551, 13 S.E.2d 362 (1941); *Murdock v. Perkins*, 219 Ga. 756, 135 S.E.2d 869 (1964); *Manning v. A.A.B. Corp.*, 223 Ga. 111, 153 S.E.2d 561 (1967); *Sonesta Int'l Hotels Corp. v. Colony*

Square Co., 482 F.2d 281 (5th Cir. 1973); *McClung v. Richardson*, 232 Ga. 530, 207 S.E.2d 472 (1974); *Shantha v. Municipal Court*, 240 Ga. 280, 240 S.E.2d 32 (1977); *Housworth v. Glisson*, 485 F. Supp. 29 (N.D. Ga. 1978); *Mulling v. Wilson*, 245 Ga. 773, 267 S.E.2d 212 (1980); *Board of Trustees v. Christy*, 154 Ga. App. 488, 269 S.E.2d 33 (1980); *City of Adairsville v. Barton*, 159 Ga. App. 810, 285 S.E.2d 581 (1981).

RESEARCH REFERENCES

ALR. — Propriety of certiorari to review decisions of public officer or board granting, denying, or revoking permit, certificate, or license required as condition of exercise of particular right or privilege, 102 ALR 534.

Legislature's express denial of right of appeal as affecting right to review on the merits by certiorari or mandamus, 174 ALR 194.

5-6-16. Time for appeal by representative where party dies after trial; effect of entry of appeal and of failure to enter appeal; when appeal heard.

(a) When either the plaintiff or the defendant dies after a case has been tried and before the expiration of the time within which the party, if living, might have entered an appeal, and no appeal has been entered, the legal representative of the deceased party may enter an appeal within 30 days from the time he qualifies. If an appeal is not entered within the time prescribed in this Code section, judgment may be entered and execution issued as though the deceased party were alive, without making the representative a party.

(b) When an appeal is entered as provided in subsection (a) of this Code section, it shall not be necessary to revive the action, but it shall be revived by the appealing party giving notice to the adverse party within 30 days from the time of entering the appeal. When a defendant appeals, the case shall stand for trial on the appeal docket at the first term of the court after the expiration of six months from the qualification of the executor or administrator.

(c) In case of the death or removal from office of any executor or administrator pending such proceedings as are prescribed in subsections (a) and (b) of this Code section, an administrator de bonis non may be made a party in like manner. (Laws 1843, Cobb's 1851 Digest, pp. 474, 502; Code 1863, §§ 3358, 3359, 3361; Code 1868, §§ 3377, 3378, 3380; Code 1873, §§ 3425, 3426, 3428; Code 1882, §§ 3425, 3426, 3428; Civil Code 1895, §§ 5023, 5024, 5026; Civil Code 1910, §§ 5605, 5606, 5608; Code 1933, §§ 3-408, 3-409, 3-411.)

Cross references. — Death of party, Rules of the Supreme Court of the State of Georgia, Rule 10. Parties, Rules of the Court of Appeals of the State of Georgia, Rule 39.

JUDICIAL DECISIONS

Section changed common law. Mims v. McKenzie, 22 Ga. App. 571, 96 S.E. 441 (1918).

Administrator de bonis non may be made party to suit in county of executor's residence. — This section and § 53-7-44 permit administrator de bonis non to be made party

to suit pending in county of residence of the executor. Walton v. Gill, 46 Ga. 600 (1872).

Rule that an administrator de bonis may be made party to a suit in the county of the executor's residence does not apply to suits by foreign executors. Jones v. Lamar, 77 Ga. 149 (1886).

Section inapplicable where plaintiff executor died before trial. *Edwards v. Sosebee*, 188 Ga. 602, 4 S.E.2d 473 (1939).

Cited in *Waldrop v. Nolan*, 192 Ga. 234, 15

S.E.2d 225 (1941); *Eubank v. Barber-Colman Co.*, 115 Ga. App. 217, 154 S.E.2d 638 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Abatement, Survival, and Revival, §§ 46, 121.

C.J.S. — 1 C.J.S., Abatement and Revival, §§ 122, 126-128. 62 C.J.S., Parties, § 62.

ALR. — Right of administrator de bonis non to recover proceeds of personal property of the estate converted by his predecessor, 3 ALR 1252.

Right to revive by amendment an action dismissed by judgment entered upon plea of abatement or demurrer, 106 ALR 570.

Death of principal defendant as abating or dissolving garnishment or attachment, 131 ALR 1146.

Death of party to divorce suit after final divorce decree, but pending appeal or period allowed for appeal, 148 ALR 1111.

Right of substitution of successive personal representatives as party plaintiff, 164 ALR 702.

Order granting or denying revival of action after death of party as final order subject to appeal, 167 ALR 261.

Continuance of civil case because of illness or death of party, 68 ALR2d 470.

Validity of exception for specific kind of tort action in survival statute, 77 ALR3d 1349.

Effect of death of party to divorce proceeding pending appeal or time allowed for appeal, 33 ALR4th 47.

Abatement of state criminal case by accused's death pending appeal of conviction—modern cases, 80 ALR4th 189.

Abatement effects of accused's death before appellate review of federal criminal conviction, 80 ALR Fed. 446.

ARTICLE 2

APPELLATE PRACTICE

Law reviews. — For article suggesting change in Georgia appellate procedure prior to the adoption of the Appellate Practice Act, see 15 Ga. B.J. 322 (1953). For article advocating reform of appellate procedure prior to the adoption of the Appellate Practice Act, see 18 Ga. B.J. 415 (1956). For article outlining proposed revisions of appellate procedure rules with comments, prior to the adoption of the Appellate Practice Act, see 19 Ga. B.J. 145 (1956). For article, "A Discussion of the 1957 Amendments to Rules of Practice and Procedure in Georgia," see 19 Ga. B.J. 395 (1957). For article discussing results of legislative changes in appellate procedure, prior to the enactment of the Appellate Practice Act, see 20 Ga. B.J. 38 (1957). For article, "The Appellate Pro-

cedure Act of 1965" (this article), see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965" (this article), see 2 Ga. St. B.J. 433 (1966). For article, "The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act" (this article), see 3 Ga. St. B.J. 383 (1967). For article discussing problems in Georgia appellate procedure after the adoption of the Appellate Practice Act of 1965 (this article), see 5 Ga. St. B.J. 231 (1968). For article discussing developments in Georgia appellate practice and procedure in 1976 to 1977 (this article), see 29 Mercer L. Rev. 21 (1977). For annual survey of appellate practice and procedure, see 36 Mercer L. Rev. 79 (1984).

JUDICIAL DECISIONS

Legislative intent of this article was to provide a uniform post-trial procedure in all courts of this state from which a writ of error (see § 5-6-50) would lie to Supreme Court or Court of Appeals at time of passage of this chapter. *White Oak Acres, Inc. v. Campbell*, 113 Ga. App. 833, 149 S.E.2d 870 (1966); *Blackburn v. Hall*, 115 Ga. App. 235, 154 S.E.2d 392 (1967).

Clear intent of this article is to simplify procedures and avoid dismissal on appeal on account of technical deficiencies. *Continental Cas. Co. v. Stephenson*, 114 Ga. App. 555, 152 S.E.2d 5 (1966).

Forms of appeals and enumerations of error are governed by practically unlimited looseness authorized by this article. *Thomas v. Scott*, 221 Ga. 875, 148 S.E.2d 300 (1966).

Compliance is prerequisite to appellate jurisdiction. — Appellate court lacks juris-

diction to review judgment sought to be appealed when appellant fails to follow procedure which confers jurisdiction upon appellate court pursuant to this chapter. *Associated Distribs., Inc. v. Willard*, 242 Ga. 247, 248 S.E.2d 645 (1978).

Court's general powers cannot be used to correct noncompliance. — While a court may have the general power to enter certain types of orders, such as those allowing late filing of papers or those entered or effective *nunc pro tunc*, that power cannot be used to correct failure to comply with the mandatory requirements of this article. *Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc.*, 147 Ga. App. 590, 249 S.E.2d 631 (1978).

Cited in *Crosby v. Crosby*, 247 Ga. 792, 279 S.E.2d 712 (1981).

RESEARCH REFERENCES

ALR. — Power of legislature to require appellate court to review evidence, 19 ALR 744; 24 ALR 1267; 33 ALR 10.

Relaxation in favor of infant of rule regarding condition of raising question on appeal or error, or on motion for new trial, 87 ALR 672.

Sufficiency of general objection or exception to evidence admitted without qualifica-

tion, which was competent against one or more parties, but not all, 106 ALR 467.

Interlocutory ruling or order of one judge as binding on another in same case, 132 ALR 14.

Judgment favorable to convicted criminal defendant in subsequent civil action arising out of same offense as ground for reversal of conviction, 96 ALR3d 1174.

5-6-30. Purpose of article; construction.

It is the intention of this article to provide a procedure for taking cases to the Supreme Court and the Court of Appeals, as authorized in Article VI, Sections V and VI of the Constitution of this state; to that end, this article shall be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case or refusal to consider any points raised therein, except as may be specifically referred to in this article. (Ga. L. 1965, p. 18, § 23; Ga. L. 1983, p. 3, § 47.)

Law reviews. — For article, "Let's Revise Appellate Procedure in Georgia," see 27 Ga. St. B.J. 135 (1991). For article, "Appeals, Interlocutory and Discretionary Applications, and Post-Judgment Motions in the Georgia Courts: The Current Practice and

the Need for Reform Legislation," see 44 Mercer L. Rev. 17 (1992).

For comment on *Davis v. Davis*, 222 Ga. 579, 151 S.E.2d 123 (1966), see 4 Ga. St. B.J. 259 (1967).

JUDICIAL DECISIONS

Purpose of appellate practice rules. — Appellate practice rules were adopted by the General Assembly for the primary purpose of securing speedy and uniform justice in a uniform and well ordered manner; they were not adopted to set traps and pitfalls, by way of technicalities, for unwary litigants. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966).

Liberal construction. — Pleadings and procedure shall be liberally construed so as to bring about decision on merits. *Grantham v. State*, 244 Ga. 775, 262 S.E.2d 777 (1979).

Although plaintiff's delay in following up on the transmission of the record was unreasonable and inexcusable, the language of this section and § 5-6-48 mandated that the appellate practice provisions be liberally construed. Accordingly, the trial court properly denied defendant's motion to dismiss where plaintiffs had filed affidavits of indigency. *Carter v. Fulton-DeKalb County Hosp. Auth.*, 209 Ga. App. 384, 433 S.E.2d 433 (1993).

Court of Appeals should pass upon all questions of law not requiring consideration of evidence. *Irby v. Christian*, 130 Ga. App. 375, 203 S.E.2d 284 (1973), rev'd on other grounds sub nom. *Department of Pub. Safety v. Irby*, 232 Ga. 384, 207 S.E.2d 23 (1974).

Code citation. — In raising constitutional issue, one need not cite to official Code, rather than Code Annotated. *Grantham v. State*, 244 Ga. 775, 262 S.E.2d 777 (1979).

Judgment overruling motion for new trial based upon appealable judgment. — Using a liberal construction as required by this section, it would be incongruous to declare unappealable a judgment overruling motion for new trial which is based upon an admittedly appealable judgment. *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

"Appellee" construed. — Interpretation of the word appellee, as used in § 5-6-38, to mean only the party against whom appeal is taken and who has a particular interest adverse to setting aside judgment appealed is too restrictive because a liberal construction of this section comports with policies of this article, enhances efficient administra-

tion of justice, and avoids multiplicity of appeals. *Executive Jet Sales, Inc. v. Jet America, Inc.*, 242 Ga. 307, 248 S.E.2d 676 (1978).

"Proceedings in lower court" construed. — To define "proceedings in lower court," as used in § 5-6-37 to mean only those proceedings which directly relate to the appellant's enumerations of error is unduly restrictive because liberal construction comports with the policies of this article, enhances the efficient administration of justice, and avoids a multiplicity of appeals. *Executive Jet Sales, Inc. v. Jet America, Inc.*, 242 Ga. 307, 248 S.E.2d 676 (1978).

Dismissal improper under § 5-6-39 where appellant does not cause delay and judge denies extension. — To construe § 5-6-39 as requiring dismissal where appellant does not cause delay and trial judge declines to grant requested extension would shut off the right of appeal, and would thus violate Ga. Const. 1976, Art. VI, Sec. II, Para. V (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II), and would be contrary to the legislative intent expressed in § 5-6-48(b) and this section as to decision upon the merits. *Elliott v. Leathers*, 223 Ga. 497, 156 S.E.2d 440 (1967).

Appeal where first-impression issue decided on merits. — Because important first-impression issue was raised under recently enacted and previously unconstrued public revenue statute, and because the trial court dealt with that issue on the merits, appellate court chose to pretermitt procedural issue and decide appeal on merits. In re *Board of Twiggs County Comm'rs*, 249 Ga. 642, 292 S.E.2d 673 (1982).

Delay in filing amendment to notice of appeal. — Although it has been over two months later, after the expiration of the statutory appeal period, that appellant filed an amendment to his original notice of appeal to correct the error he made, in light of this section and § 5-6-48, appellant is entitled to amend his notice of appeal to correct the name of the court to which the appeal is directed. *Griffin v. Johnson*, 157 Ga. App. 657, 278 S.E.2d 422 (1981).

Dismissal proper where procedure not complied with. — Where appellant has failed to comply with the interlocutory review procedure, her appeal must be dismissed. *Bautz v. Best*, 166 Ga. App. 268, 304 S.E.2d 439 (1983).

Dismissal of appeal not warranted. See *Estate of Thurman v. Dodaro*, 169 Ga. App. 531, 313 S.E.2d 722 (1984).

Cited in *Crowe v. Holloway Dev. Corp.*, 114 Ga. App. 856, 152 S.E.2d 913 (1966); *Puckett v. Edmonds*, 115 Ga. App. 776, 156 S.E.2d 151 (1967); *Mixon v. Hall*, 117 Ga. App. 626, 161 S.E.2d 429 (1968); *Bonner v. Smith*, 226 Ga. 250, 174 S.E.2d 438 (1970); *Gilmore v. State*, 127 Ga. App. 249, 193 S.E.2d 219 (1972); *Ramsey v. Ramsey*, 231 Ga. 334, 201 S.E.2d 429 (1973); *Taylor v. Columbia County Planning Comm'n*, 232 Ga. 155, 205 S.E.2d 287 (1974); *Blanchard v. Westview Cem.*, 133 Ga. App. 262, 211 S.E.2d 135 (1974); *Checker Cab Co. v. Fedor*, 134 Ga. App. 28, 213 S.E.2d 485 (1975); *Contractors Mgt. Corp. v. McDowell-Kelley, Inc.*, 136 Ga. App. 116, 220 S.E.2d 473 (1975); *Gold Kist, Inc. v. Stokes*, 235 Ga. 643, 221 S.E.2d

49 (1975); *State v. Eubanks*, 239 Ga. 483, 238 S.E.2d 38 (1977); *Justice v. Dunbar*, 244 Ga. 415, 260 S.E.2d 327 (1979); *Harrison v. Southern Talc Co.*, 245 Ga. 212, 264 S.E.2d 2 (1980); *Cochran v. Levitz Furn. Co.*, 249 Ga. 504, 291 S.E.2d 535 (1982); *Steele v. Cincinnati Ins. Co.*, 252 Ga. 58, 311 S.E.2d 470 (1984); *Dugger v. Danello*, 175 Ga. App. 618, 334 S.E.2d 3 (1985); *Neese v. Long*, 178 Ga. App. 105, 341 S.E.2d 861 (1986); *Vaughan v. Brown*, 181 Ga. App. 680, 353 S.E.2d 608 (1987); *Sharp v. State*, 183 Ga. App. 641, 360 S.E.2d 50 (1987); *City of Atlanta v. Starke*, 192 Ga. App. 267, 384 S.E.2d 419 (1989); *Butts v. State*, 193 Ga. App. 824, 389 S.E.2d 395 (1989); *Griffin v. State*, 194 Ga. App. 624, 391 S.E.2d 675 (1990); *Hall v. World Omni Leasing, Inc.*, 209 Ga. App. 115, 433 S.E.2d 297 (1993); *Wells v. State*, 210 Ga. App. 165, 435 S.E.2d 523 (1993).

5-6-31. Entry of judgment defined.

The filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment within the meaning of this article. (Ga. L. 1965, p. 18, § 18B.)

Cross references. — Motions for rehearing, Rules of the Court of Appeals of the State of Georgia, Rule 48.

Law reviews. — For article comparing

sections of Ch. 11, T. 9 with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

JUDICIAL DECISIONS

Judgment is effective only upon entry. — The rule is clear under Civil Practice Act, and under Appellate Practice Act, that a judgment is effective only upon entry. *Minnich v. First Nat'l Bank*, 154 Ga. App. 439, 268 S.E.2d 688 (1980).

Judgment cannot be considered appealable until actually entered. *Cunningham v. State*, 131 Ga. App. 133, 205 S.E.2d 899, rev'd on other grounds, 232 Ga. 416, 207 S.E.2d 48 (1974).

Court of Appeals lacked jurisdiction to consider enumerations of error arising from breach of contract claim, since the jury's verdict on the claim was never reduced to judgment because of plaintiff's election to have judgment entered on his theory of fraud. *Miner v. Harrison*, 205 Ga. App. 523, 422 S.E.2d 899, cert. denied, 205 Ga. App. 900, 422 S.E.2d 899 (1992).

Where notice of appeal is filed before entry of judgment, appeal must be dismissed. *Cunningham v. State*, 131 Ga. App. 133, 205 S.E.2d 899, rev'd on other grounds, 232 Ga. 416, 207 S.E.2d 48 (1974).

Both written judgment and entry by filing with clerk are prerequisite. — Under the Appellate Practice Act the well established rule that what the judge orally declares is no judgment until put into writing and entered as such, is still of force, and both written judgment and its entry by filing writing with clerk are essential prerequisites to appeal. *Boynton v. Reeves*, 226 Ga. 202, 173 S.E.2d 702 (1970).

Filing judgment signed by judge with clerk constitutes entry. *Minnich v. First Nat'l Bank*, 154 Ga. App. 439, 268 S.E.2d 688 (1980).

Entry means filing judgment signed by judge in office of clerk of court. *Joiner v.*

Perkerson, 160 Ga. App. 343, 287 S.E.2d 327 (1981).

Filing of judgment in open court with trial judge as provided in § 9-11-5 (e) is the entry of judgment within the meaning of this section. *Storch v. Hayes Microcomputer Prods., Inc.*, 181 Ga. App. 627, 353 S.E.2d 350 (1987).

Directed verdict is reduced to writing by virtue of recitation in verdict signed by judge. — Although directed verdict is normally issued ore tenus, it becomes reduced to writing by virtue of its recitation in the verdict which is signed by the judge and therefore is reviewable as a final judgment. *Crowe v. Holloway Dev. Corp.*, 114 Ga. App. 856, 152 S.E.2d 913 (1966).

Entry of oral order. — An oral order is not final nor appealable until and unless it is reduced to writing, signed by the judge, and filed with the clerk. This constitutes "entry." And it is only an "entered" decision or judgment which is appealable. *Sharp v. State*, 183 Ga. App. 641, 360 S.E.2d 50 (1987).

The date on a copy of a judgment bearing a certification by a deputy clerk to the effect

that the copy is a true and correct reproduction of the original on file with the court, serves as the starting date of the appeal period if no evidence is presented as to the actual date of the filing of judgment. *Swinney v. City of Atlanta*, 176 Ga. App. 823, 338 S.E.2d 52 (1985).

Cited in *Gibson v. Hodges*, 221 Ga. 779, 147 S.E.2d 329 (1966); *Langdale Co. v. Day*, 115 Ga. App. 30, 153 S.E.2d 671 (1967); *Spadea v. Spadea*, 225 Ga. 80, 165 S.E.2d 836 (1969); *Turner v. Harper*, 231 Ga. 175, 200 S.E.2d 748 (1973); *Alexander v. Blackmon*, 129 Ga. App. 214, 199 S.E.2d 376 (1973); *Unigard Mut. Ins. Co. v. Carroll*, 131 Ga. App. 699, 206 S.E.2d 603 (1974); *Pilgrim v. Brookfield West, Inc.*, 136 Ga. App. 619, 222 S.E.2d 137 (1975); *Lewis & Sheron Enterprises, Inc. v. Great A & P Tea Co.*, 136 Ga. App. 910, 222 S.E.2d 659 (1975); *Bowen v. State*, 239 Ga. 517, 238 S.E.2d 62 (1977); *Murff v. State*, 165 Ga. App. 808, 302 S.E.2d 697 (1983); *Davis v. Langham*, 170 Ga. App. 346, 317 S.E.2d 903 (1984); *Ramirez v. State*, 196 Ga. App. 11, 395 S.E.2d 315 (1990).

RESEARCH REFERENCES

C.J.S. — 4 C.J.S., Appeal and Error, §§ 82, 83, 85, 101, 120, 579, 586, 590, 591.

ALR. — Appeal as affecting time allowed

by judgment or order appealed from for the performance of a condition affecting a substantive right or obligation, 28 ALR 1029.

5-6-32. Manner of service of notices and other papers upon parties; waiver or acknowledgment of service.

(a) Whenever under this article service or the giving of any notice is required or permitted to be made upon a party and the party is represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service of all notices and other papers hereunder and service of motions for new trial, motions in arrest, motions for judgment notwithstanding the verdict, and all other similar motions, orders, and proceedings may be made by the attorney or party filing the notice or paper, in person or by mail, and proof thereof shown by acknowledgment of the attorney or party served, or by certificate of the attorney, party, or other person perfecting service. Service of any paper, motion, or notice may be perfected either before or after filing with the clerk thereof; and when service is made by mail it shall be deemed to be perfected as of the day deposited in the mail. Where the address of any party is unknown and the party is not represented by an attorney of record,

service of all notices and other papers referred to above may be perfected on the party by mail directed to the last known address of the party.

(b) Service of any notice, motion, or other paper provided for in this article may be waived or acknowledged either before or after filing. (Ga. L. 1965, p. 18, § 18; Ga. L. 1966, p. 493, § 7; Ga. L. 1968, p. 1072, § 5.)

Cross references. — Service of motion for supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Service where capital crime involved, Rules of the Supreme Court of the State of Georgia, Rule 44. Preparation and filing of motions, Rules of the Court of Appeals of the State of Georgia, Rule 32. Notices of appeal

and cross appeal, Rules of the Court of Appeals of the State of Georgia, Rule 33. Objections to records or transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 47.

Law reviews. — For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966). For article, "Synopsis of 1968 Amendments Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968).

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Section assumedly includes service of rules nisi issued on motions for new trial. Short v. Riles, 141 Ga. App. 881, 234 S.E.2d 710 (1977).

Service of enumeration of errors need be made only by mail under this section. Travelers Ins. Co. v. Burch, 114 Ga. App. 723, 152 S.E.2d 697 (1966).

Service by mail prior to filing of original notice of appeal. — It is no ground for dismissal of an appeal that service of notice of appeal was made by mail three days before original was filed, or that order was in the first instance erroneously dated. Fidelity & Cas. Co. v. Whitehead, 117 Ga. App. 200, 160 S.E.2d 241 (1968).

Failure to serve notice of appeal as required by section. — Failure to serve notice

of appeal upon appellee's attorney as required by this section is insufficient within itself to work dismissal under § 5-6-48, because court could require that service be perfected in the manner prescribed by law. Birdwell v. Pippen, 113 Ga. App. 202, 147 S.E.2d 673 (1966).

Trial court not deprived of jurisdiction because appellant fails to serve notice of appeal on appellee as required. Bull v. Bull, 243 Ga. 72, 252 S.E.2d 494 (1979).

Cited in Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967); City of Atlanta v. Cagle, 146 Ga. App. 324, 246 S.E.2d 380 (1978); Shipman v. Horizon Corp., 151 Ga. App. 242, 259 S.E.2d 221 (1979).

RESEARCH REFERENCES

C.J.S. — 4 C.J.S., Appeal and Error, §§ 368-380.

ALR. — Who is adverse party within statute providing for service of notice of appeal on adverse party, 88 ALR 419.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion, 23 ALR2d 852.

5-6-33. Right of appeal generally.

(a) (1) Either party in any civil case and the defendant in any criminal proceeding in the superior, state, or city courts may appeal from any sentence, judgment, decision, or decree of the court, or of the judge thereof in any matter heard at chambers.

(2) Either party in any civil case in the probate courts provided for by Article 6 of Chapter 9 of Title 15 may appeal from any judgment, decision, or decree of the court, or of the judge thereof in any matter heard at chambers.

(b) This Code section shall not affect Chapter 7 of this title. (Orig. Code 1863, § 4160; Code 1868, § 4192; Code 1873, § 4251; Ga. L. 1880-81, p. 123, § 1; Code 1882, § 4251; Ga. L. 1887, p. 41, § 1; Civil Code 1895, § 5527; Penal Code 1895, § 1070; Civil Code 1910, § 6139; Penal Code 1910, § 1097; Code 1933, § 6-901; Ga. L. 1965, p. 18, § 22; Ga. L. 1986, p. 982, § 5.)

Cross references. — Appeal or certiorari by state in criminal cases, Ch. 7 of this Title. Appeals in habeas corpus cases, §§ 9-14-22, 9-14-52. Review of death sentences by Supreme Court, § 17-10-35 et seq. Appeal to Court of Appeals or Supreme Court from final judgment of superior court pertaining to review of final decision of administrative agency, § 50-13-20.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, a comma was deleted following “city courts” in paragraph (1) of subsection (a).

Editor’s notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
WHEN APPEAL LIES
WHO MAY APPEAL
CRIMINAL PROCEEDINGS

General Consideration

Liberality is exercised in favor of right of review. *Armour Car Lines v. Summerour*, 5 Ga. App. 619, 63 S.E. 667 (1909).

No question will be considered on appeal unless it was passed on by trial court. — No question will be considered by appellate courts of this state unless it was presented to and passed on by trial court. This rule of law is applicable, whether the case be one involving issues of law and fact, or one involving merely questions of law decided on an agreed statement of facts. *Garland v. State*, 101 Ga. App. 395, 114 S.E.2d 176 (1960).

Where question has never been referred

to or decided by court below, it cannot be reviewed by appellate court. *Hart v. Altmeyer & Co.*, 74 Ga. 367 (1884).

Judge must approve verdict before state can review his action. — In criminal proceeding trial judge must approve verdict, and if he does not, state cannot review his action in setting aside conviction. *Sims v. State*, 221 Ga. 190, 144 S.E.2d 103 (1965), rev’d on other grounds, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593, later appeal, 223 Ga. 465, 156 S.E.2d 65, rev’d on other grounds, 389 U.S. 404, 88 S. Ct. 523, 19 L. Ed. 2d 634 (1967).

Cited in *Banigan v. Nelms*, 106 Ga. 441, 32 S.E. 337 (1899); *Key v. State*, 207 Ga. 552, 63

General Consideration (Cont'd)

S.E.2d 356 (1951); *Hester v. Dixie Fin. Corp.*, 109 Ga. App. 204, 135 S.E.2d 504 (1964); *Lowndes County v. Dasher*, 229 Ga. 289, 191 S.E.2d 82 (1972); *Sheet Metal Workers Int'l Ass'n v. Carter*, 131 Ga. App. 176, 205 S.E.2d 715 (1974); *Daniels v. McRae*, 180 Ga. App. 732, 350 S.E.2d 317 (1986); *State v. Speir*, 189 Ga. App. 254, 375 S.E.2d 298 (1988); *Massachusetts Bay Ins. Co. v. Hall*, 196 Ga. App. 349, 395 S.E.2d 851 (1990).

When Appeal Lies

What is a judgment. — A judgment is a decision or sentence of law, pronounced by the court and entered upon its docket, minutes, or record. A mere oral decision is not a judgment from which an appeal can be entered, until it has been put in writing and entered as such. *Easterling v. State*, 11 Ga. App. 134, 74 S.E. 899 (1912), later appeal, 12 Ga. App. 690, 78 S.E. 140 (1913).

Matters not of a criminal nature. — State may appeal decisions respecting bonds, recognizances, and other matters not strictly of criminal nature. *City of Atlanta v. Stallings*, 198 Ga. 510, 32 S.E.2d 256 (1944) (decided before enactment of Ch. 7 of this Title).

City court decision in habeas corpus case is reviewable under section. — Writ of error (see § 5-6-50) will lie direct to Supreme Court from decision of judge of city court in habeas corpus case. *Barranger v. Baum*, 103 Ga. 465, 30 S.E. 524, 68 Am. St. R. 113 (1898).

Verdict of jury, whether directed or by deliberation, is not an appealable judgment under any provisions of the Appellate Practice Act. *Smith v. Sorrough*, 226 Ga. 744, 177 S.E.2d 246 (1970).

Sustaining of motion for directed verdict is not an appealable judgment under any provisions of the Appellate Practice Act. *Smith v. Sorrough*, 226 Ga. 744, 177 S.E.2d 246 (1970).

Granting of ex parte order for injunction not reviewable under section. *Johnson v. Stewart*, 40 Ga. 167 (1869).

Sustaining motion to dismiss plea and overruling striking of plea. — Sustaining of demurrer (now motion to dismiss) to plea in abatement and overruling of the striking of the plea is not a final judgment in the case, and a direct bill of exceptions (see §§ 5-6-49

and 5-6-50) assigning error thereon cannot be maintained. *Jackson v. State*, 76 Ga. 551 (1886); *Hightower v. State*, 22 Ga. App. 276, 95 S.E. 873 (1918).

Who May Appeal

Only party to case below can bring case to appellate court. *Epping v. Aiken*, 71 Ga. 682 (1883); *Booth v. Saunders*, 128 Ga. 33, 57 S.E. 93 (1907); *Edwards v. Gabrels*, 42 Ga. App. 163, 155 S.E. 340 (1930).

Party not aggrieved by judgment of trial court is without legal right to except thereto, since he has no just cause of complaint. *Cooper Motor Lines v. B.C. Truck Lines*, 215 Ga. 195, 109 S.E.2d 689 (1959).

Only accused may appeal adverse judgment in criminal proceeding. *City of Gainesville v. Butts*, 127 Ga. App. 140, 193 S.E.2d 59 (1972) (decided before enactment of Ch. 7 of this Title).

Writ of error (see § 5-6-50) does not lie in criminal case at instance of state. *State v. Johnson*, 61 Ga. 640 (1878); *City of Atlanta v. Stallings*, 198 Ga. 510, 32 S.E.2d 256 (1944) (decided before enactment of Ch. 7 of this Title).

A judgment in favor of defendant in criminal case cannot be appealed by the state absent an express statutory provision. *State v. Gossett*, 214 Ga. 840, 108 S.E.2d 272 (1959) (decided before enactment of Ch. 7 of this Title).

Decision of superior court reversing conviction in municipal court. — Decision of superior court on certiorari reversing judgment of a municipal court convicting one of a violation of a municipal ordinance is not subjected to review by this court and may not be appealed by city. *City of Moultrie v. Csiki*, 71 Ga. App. 13, 29 S.E.2d 785 (1944); *City of Gainesville v. Butts*, 127 Ga. App. 140, 193 S.E.2d 59 (1972) (decided before enactment of Ch. 7 of this Title).

State generally cannot appeal grant of new trial or quash of conviction. — Absent statute expressly so providing, state cannot appeal from order granting accused a new trial, or from order quashing conviction and sentence. *State v. Gossett*, 214 Ga. 840, 108 S.E.2d 272 (1959) (decided before enactment of Ch. 7 of this Title).

Georgia courts generally refuse to entertain appeals of escapees. — If, however, information or proof reaches court of the

surrender or recapture of escaped appellant before dismissal, appeal is not dismissed summarily; but appellant must be in custody within jurisdiction of the State of Georgia. *Golden v. State*, 145 Ga. App. 36, 243 S.E.2d 303 (1978).

Fugitive from justice forfeits all right to have the aid of courts in reviewing errors claimed to have occurred in connection with his case. *Shelton v. State*, 131 Ga. App. 786, 206 S.E.2d 654 (1974).

Where plaintiff in error escapes, his bill of exceptions will be dismissed (see §§ 5-6-49 and 5-6-50) when he fails to surrender himself. *Staten v. State*, 140 Ga. 110, 78 S.E. 766 (1913).

Insurance company filing caveat to petition for appointment of estate administrator. — Insurance company, which was deceased attorney's errors and omissions carrier, had the right to file an appeal from grant of letters of administration to appellee since such action implicitly denied the insurance company's caveat to appellee's petition for appointment. *General Accident Ins. Co. v. Wells*, 179 Ga. App. 440, 346 S.E.2d 886 (1986).

Criminal Proceedings

Proceeding must involve possibility of fine or imprisonment. — Proceedings instituted by state for violations of penal laws, and prosecutions by cities for infraction of criminal municipal ordinances, each of which involve the possibility of fine or imprison-

ment, are criminal proceedings not subject to review at instance of state or city. *City of Atlanta v. Stallings*, 198 Ga. 510, 32 S.E.2d 256 (1944) (decided before enactment of Ch. 7 of this Title).

Proceedings as to revocation of probation order. — Where superior court judge sustains certiorari sued out by probationer and orders him discharged and relieved from all further liability in connection with orders and judgment of the judge of a city court, the proceedings, both in city court and in superior court, as to revocation of the probation order, constitute a criminal proceeding within meaning of section, thus state has no right to except, and Court of Appeals is without jurisdiction to entertain the case. *State v. Thompson*, 45 Ga. App. 530, 165 S.E. 310 (1932) (decided before enactment of Ch. 7 of this Title).

Prosecution for violation of city ordinance is a quasi-criminal action. *City of Moultrie v. Csiki*, 71 Ga. App. 13, 29 S.E.2d 785 (1944).

Prosecution to remove clerk of superior court. — Prosecution to remove clerk of superior court under § 15-6-82 is a quasi-criminal proceeding and upon acquittal cannot be reviewed. *Cobb v. Smith*, 102 Ga. 585, 27 S.E. 763 (1897).

Waiver of right to appeal. — A criminal defendant may waive his statutory right to appeal a conviction in return for the state's waiver of the right to seek the death penalty. *Thomas v. State*, 260 Ga. 262, 392 S.E.2d 520 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 1-3, 172-185.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 154-201. 24 C.J.S., Criminal Law, §§ 1674, 1680, 1681.

ALR. — Right to appeal from order releasing one in extradition proceedings, 5 ALR 1156.

Power of legislature to require appellate court to review evidence, 24 ALR 1267; 33 ALR 10.

Payment of fine, serving sentence, or discharge on habeas corpus, as waiver of right to review conviction, 74 ALR 638.

Power of appellate court to reconsider its decision after mandate has issued, 84 ALR 579.

Right of public officer or board to appeal from a judicial decision affecting his or its order or decision, 117 ALR 216.

Acceptance of probation, parole, or suspension of sentence as waiver of error or right to appeal or to move for new trial, 117 ALR 929.

Right of appeal in proceeding for restoration to competency, 122 ALR 541.

Application for or acceptance of executive clemency as affecting appellate proceedings or motion for new trial, 138 ALR 1162.

Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction, 9 ALR2d 661.

Questions or legal theories affecting trust

estates as subject to consideration on appeal though not raised below, 11 ALR2d 317.

Appealability of order granting or denying right of intervention, 15 ALR2d 336.

Appealability of order pertaining to pre-trial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 ALR2d 1352.

Inattention of juror from sleepiness or

other cause as ground for reversal or new trial, 88 ALR2d 1275.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

Validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement, 89 ALR3d 864.

Appeal by state of order granting new trial in criminal case, 95 ALR3d 596.

Right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance — modern status, 11 ALR4th 399.

5-6-34. Judgments and rulings deemed directly appealable; procedure for review of judgments, orders, or decisions not subject to direct appeal; scope of review; hearings in criminal cases involving a capital offense for which death penalty is sought.

(a) Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state:

(1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35;

(2) All judgments involving applications for discharge in bail trover and contempt cases;

(3) All judgments or orders directing that an accounting be had;

(4) All judgments or orders granting or refusing applications for receivers or for interlocutory or final injunctions;

(5) All judgments or orders granting or refusing applications for attachment against fraudulent debtors;

(6) All judgments or orders granting or refusing to grant mandamus or any other extraordinary remedy, except with respect to temporary restraining orders;

(7) All judgments or orders refusing applications for dissolution of corporations created by the superior courts; and

(8) All judgments or orders sustaining motions to dismiss a caveat to the probate of a will.

(b) Where the trial judge in rendering an order, decision, or judgment, not otherwise subject to direct appeal, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal

to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted. The application shall be in the nature of a petition and shall set forth the need for such an appeal and the issue or issues involved therein. The applicant may, at his or her election, include copies of such parts of the record as he or she deems appropriate, but no certification of such copies by the clerk of the trial court shall be necessary. The application shall be filed with the clerk of the Supreme Court or the Court of Appeals and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties in the case in the manner prescribed by Code Section 5-6-32, except that such service shall be perfected at or before the filing of the application. The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the application was filed. Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, may file a notice of appeal as provided in Code Section 5-6-37. The notice of appeal shall act as a supersedeas as provided in Code Section 5-6-46 and the procedure thereafter shall be the same as in an appeal from a final judgment.

(c) In criminal cases involving a capital offense for which the death penalty is sought, a hearing shall be held as provided in Code Section 17-10-35.2 to determine if there shall be a review of pretrial proceedings by the Supreme Court prior to a trial before a jury. Review of pretrial proceedings, if ordered by the trial court, shall be exclusively as provided by Code Section 17-10-35.1 and no certificate of immediate review shall be necessary.

(d) Where an appeal is taken under any provision of subsection (a), (b), or (c) of this Code section, all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law contained in this Code section, or elsewhere. For purposes of review by the appellate court, one or more judgments, rulings, or orders by the trial court held to be erroneous on appeal shall not be deemed to have rendered all subsequent proceedings nugatory; but the appellate court shall in all cases review all judgments, rulings, or orders raised on appeal which may affect the proceedings below and which were rendered subsequent to the first judgment, ruling, or order held erroneous. Nothing in this subsection shall require the appellate court to pass upon questions which are rendered moot. (Orig. Code 1863, § 4159; Code 1868, § 4191; Code 1873, § 4250;

Code 1882, § 4250; Ga. L. 1890-91, p. 82, § 1; Civil Code 1895, § 5526; Penal Code 1895, § 1069; Civil Code 1910, § 6138; Penal Code 1910, § 1096; Code 1933, § 6-701; Ga. L. 1965, p. 18, § 1; Ga. L. 1968, p. 1072, § 1; Ga. L. 1975, p. 757, § 1; Ga. L. 1979, p. 619, §§ 1, 2; Ga. L. 1984, p. 599, § 1; Ga. L. 1988, p. 1437, § 1; Ga. L. 1994, p. 347, § 1.)

The 1994 amendment, effective July 1, 1994, in subsection (b), in the third sentence, inserted "or her" and "or she" and, in the seventh sentence, substituted "30 days" for "15 days" and deleted "the response of the opposing party or parties is filed with the court or, in the event that no response is filed, within 25 days of the date on which" preceding "the application".

Cross references. — Certification for immediate review of nonfinal judgments, § 5-7-2. Applicability of section to orders denying summary judgment, see § 9-11-56. Right of appeal by first offenders placed on probation, see § 42-8-64. Granting of application for leave to appeal interlocutory order, Rules of the Supreme Court of the State of Georgia, Rule 22. Jurisdictional statement and copy of order and compliance with statutory duty to file notice of appeal, Rules of the Supreme Court of the State of Georgia, Rule 24. Leave to appeal interlocutory order, Rules of the Court of Appeals of the State of Georgia, Rule 29. Leave to appeal, Rules of the Court of Appeals of the State of Georgia, Rule 40.

Law reviews. — For article discussing the inefficiency of mandamus and impeachment as remedies for judicial inaction, see 5 Ga. St. B.J. 467 (1969). For article surveying Georgia cases in the area of trial practice and procedure from June 1977 through May 1978, see 30 Mercer L. Rev. 239 (1978). For article surveying judicial developments in Georgia's trial practice and procedure laws,

see 31 Mercer L. Rev. 249 (1979). For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For article surveying recent developments in administrative law, see 37 Mercer L. Rev. 503 (1985). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986). For annual survey of appellate practice and procedure, see 40 Mercer L. Rev. 51 (1988). For article, "Intangible Tax Appeals After *Blank v. Collins*; The Uncertainty Continues," see 27 Ga. St. B.J. 78 (1990). For article, "Let's Revise Appellate Procedure in Georgia," see 27 Ga. St. B.J. 135 (1991). For article, "Getting Certiorari Granted", 28 Ga. St. B.J. 90 (1991). For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991). For annual survey of domestic relations, see 43 Mercer L. Rev. 243 (1991). For article, "Appeals, Interlocutory and Discretionary Applications, and Post-Judgment Motions in the Georgia Courts: The Current Practice and the Need for Reform Legislation," see 44 Mercer L. Rev. 17 (1992).

For comment on *Sayers v. Rothberg*, 222 Ga. 626, 151 S.E.2d 445 (1967), see 3 Ga. St. B.J. 489 (1967). For comment on *Milholland v. Oglesby*, 223 Ga. 230, 154 S.E.2d 194 (1967), see 4 Ga. St. B.J. 392 (1968).

JUDICIAL DECISIONS

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APPLICATION

1. IN GENERAL
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General Consideration

1. Constitutionality and Purpose of Section

Editor's notes. — The conditional plea procedures established in *Mims v. State*, 201 Ga. App. 277, 410 S.E.2d 824 are disapproved and will no longer be allowed by the Court of Appeals of Georgia; *Mims v. State*, 201 Ga. App. 277, 410 S.E.2d 824 on this issue, and all decisions by the Court of Appeals of Georgia based upon *Mims v. State* authorizing conditional pleas, will not be followed. See *Hooten v. State*, 212 Ga. App. 770, 442 S.E.2d 836 (1994), annotated below.

Constitutionality of section. — See *Fife v. Johnston*, 225 Ga. 447, 169 S.E.2d 167 (1969).

Purpose of Appellate Practice Act is to simplify procedure for bringing cases to appellate court, and nothing therein should be construed as changing time honored and fundamental rule stemming from very nature of appellate jurisdiction that neither this court nor Supreme Court will consider, nor do they in fact have jurisdiction to consider, any question unless it has been raised in first instance in trial court. *Taylor v. ROA Motors, Inc.*, 114 Ga. App. 671, 152 S.E.2d 631 (1966).

Legislative intent of section. — The legislature in enacting subsections (a) and (b) of this section intended to follow federal procedure, and commensurate policy, of precluding piecemeal appeals. *Lee v. Smith*, 119 Ga. App. 808, 168 S.E.2d 880 (1969).

Certificate of immediate review is not "surplusage." The certificate is an essential component of a trial court's power to control litigation. *Scruggs v. Georgia Dep't of*

Human Resources, 261 Ga. 587, 408 S.E.2d 103 (1991).

Statutes dealing with appellate practice in conflict with this section were impliedly repealed by Ga. L. 1965, p. 18. — Georgia L. 1965, p. 18 was intended as a comprehensive revision of appellate and other post-trial procedure, and failure to specifically enumerate in repealing clauses thereof any statute, Code section or Act dealing with subject of appellate practice and procedure shall not be construed as continuing in effect such Code section, statute or Act as may be in conflict with this section. *Parker v. Averett*, 113 Ga. App. 576, 149 S.E.2d 199 (1966).

Conditional pleas. — The conditional plea procedures established in *Mims v. State* 201 Ga. App. 277, 410 S.E.2d 824, are disapproved and will no longer be allowed by this court; 30 days after the date this opinion is published in the official advance sheets, pleas in which the accused attempts to condition upon the preservation of the rights to raise non-jurisdictional errors by the trial court will not be considered by this court. *Hooten v. State*, 212 Ga. App. 770, 442 S.E.2d 836 (1994).

2. Construction in General

There can be no effective appeal from anything but a judgment; a final judgment without a certificate, or an interlocutory judgment with a certificate, reduced to writing and entered by filing with clerk. *G.M.J. v. State*, 130 Ga. App. 420, 203 S.E.2d 608 (1973).

Compared with § 5-6-35. — Code § 5-6-35 applies to all appeals specified therein, whether the judgment be final, interlocutory, or summary. Thus in an action to

General Consideration (Cont'd)
2. Construction in General (Cont'd)

modify support obligations, the wife, whose motion to dismiss was denied, was correct in following the discretionary-application procedure, within the 30-day period of § 5-6-35(d), rather than the procedures set out in this Code section. *Straus v. Straus*, 260 Ga. 327, 393 S.E.2d 248 (1990).

Construed with § 5-6-35(a). — The phrase “following cases” in § 5-6-35(a) is construed to exclude those cases in which subsection (d) of this section is applicable; thus, since the appellants filed a motion styled as both a motion for a new trial and a motion to set aside the judgment, but it was clearly only a motion for new trial since it raised issues relating to the verdict but none relating to a motion to set aside under § 9-11-60(d), the Court of Appeals erred in dismissing the appeal. *Martin v. Williams*, 263 Ga. 707, 438 S.E.2d 353 (1994).

The underlying subject matter generally controls over the relief sought in determining the proper procedure to follow to appeal; thus, where a trial court issues a judgment listed in the direct appeal statute in a case whose subject matter is covered under the discretionary appeal statute, the discretionary application procedure must be followed when the party is appealing a judgment or order that is procedurally subject to a direct appeal. *Rebich v. Miles*, 264 Ga. 467, 448 S.E.2d 192 (1994).

In plaintiff's appeal of the denial of her request for a declaratory judgment, she could add issues relating to other rulings which might affect the proceedings below without regard to whether they were appealable standing alone. *Smith v. Department of Human Resources*, 214 Ga. App. 508, 448 S.E.2d 372 (1984).

Effect of 1986 amendment of § 40-13-28. — The 1986 amendment to § 40-13-28 that changed the scope of review in the superior court from a de novo investigation to a review of the record was not also intended to change the method of appeal from the superior court in such cases from discretionary appeals under § 5-6-35(a)(1) to direct appeals under subsection (a). *Brown v. City of Marietta*, 214 Ga. App. 840, 449 S.E.2d 540 (1994).

Entry of judgment question not appealable. — There is no authority for the trial

court to grant an appellant the right to file an “extraordinary appeal” to determine whether or not judgment should be entered in a case. *Robbins v. State*, 193 Ga. App. 5, 387 S.E.2d 18 (1989).

In appeal from verdict, mere mention in notice of a final judgment is insufficient. — Where appeal was taken from verdict and ruling which was not an appealable judgment, mere mention in notice of appeal of judgment overruling motion for new trial does not constitute appeal from final judgment so as to satisfy requirements of this article. *Davis v. Davis*, 224 Ga. 740, 164 S.E.2d 816 (1968).

Section allows review by appeal as a matter of right as to all final judgments. *Harwell v. State*, 127 Ga. App. 204, 193 S.E.2d 257 (1972).

What orders, decisions or judgments are directly appealable. — To be subject to direct appeal, an order, decision or judgment must be final such that cause is no longer pending in court below, or involving an issue specified as directly appealable under subsection (a) of this section. *Stallings v. Chance*, 239 Ga. 567, 238 S.E.2d 327 (1977).

No direct appeal from interlocutory order in probate court. — An appeal from the probate court to a superior court is for the purpose of conducting a de novo investigation in the superior court, and not for the purpose of correcting errors of law committed in the probate court. Thus, there can be no direct appeal to the superior court from an interlocutory ruling in the probate court. *Driver v. State*, 198 Ga. App. 643, 402 S.E.2d 524, cert. denied, 198 Ga. App. 897, 402 S.E.2d 524 (1991).

Absent final ruling by trial court, there is nothing for appellate court to pass upon. *Cole v. Frostgate Whses., Inc.*, 150 Ga. App. 320, 257 S.E.2d 309, rev'd on other grounds, 244 Ga. 782, 262 S.E.2d 99 (1979).

When decision is not appealable under section. — Decision is not an appealable judgment where (1) case is still pending in court below; (2) record contains no certificate of trial judge certifying that decision appealed from is of such importance to case that immediate review should be had; and (3) decision is not one of those specifically described judgments from which appeal is permitted by subsection (a) of this section. *Dowdy v. White*, 119 Ga. App. 793, 168 S.E.2d 595 (1969).

Appeals from superior courts in traffic cases. — All appeals from judgments of superior courts in traffic cases under § 40-13-28 must follow the procedures in § 5-6-35(a). Accordingly, 30 days after the date this decision is published in the official advance sheets any direct appeals in these cases filed under subsection (a) will be dismissed. *Brown v. City of Marietta*, 214 Ga. App. 840, 449 S.E.2d 540 (1994).

No direct appeal from recorder's court to Supreme Court. — A direct appeal from the recorder's court to the Supreme Court was not available in a case challenging the constitutionality of an ordinance. Instead, the proper method of review was by certiorari to the superior court. *Russell v. City of East Point*, 261 Ga. 213, 403 S.E.2d 50, cert. denied, U.S. , 112 S. Ct. 448, 116 L. Ed. 2d 466 (1991).

Section inapplicable to cases arising under Administrative Procedure Act. — The interlocutory appeal procedure set forth in this section does not apply to cases arising under the Administrative Procedure Act, because that Act does not authorize appellate court review of such cases unless the reviewing superior court has rendered a "final judgment." *State Health Planning Review Bd. v. Piedmont Hosp.*, 173 Ga. App. 450, 326 S.E.2d 814 (1985).

Discretion of trial judge. — Broad discretion is given trial judge in determining whether interlocutory application is appropriate. *Brown v. State*, 177 Ga. App. 146, 338 S.E.2d 718 (1985).

Criminal defendants cannot cross appeal suits brought by state. — Despite resultant justice and judicial economy, court will not allow criminal defendants to cross appeal suits brought before court by state pursuant to § 5-7-1; § 5-6-38 limits that right to civil parties and the court will not encroach upon the legislature's prerogative by extending that right. *State v. Crapse*, 173 Ga. App. 100, 325 S.E.2d 620 (1984), overruled in part on other grounds, *Hubbard v. State*, 176 Ga. App. 622, 337 S.E.2d 60 (1985).

What constitutes final judgment. — Even though an order does not specify that it is a grant of final judgment, it nevertheless constitutes a final judgment within the meaning of this section where it leaves no issues remaining to be resolved, constitutes the court's final ruling on the merits of the

action, and leaves the parties with no further recourse in the trial court. *Caswell v. Caswell*, 157 Ga. App. 710, 278 S.E.2d 452 (1981); *Vurgess v. State*, 187 Ga. App. 700, 371 S.E.2d 191 (1988); *Decubas v. Norfolk S. Corp.*, 193 Ga. App. 387, 388 S.E.2d 336 (1989), rev'd on other grounds, 260 Ga. 136, 390 S.E.2d 216 (1990); *Spring-U Bonding Co. v. State*, 200 Ga. App. 533, 408 S.E.2d 831 (1991).

Finality for res judicata purposes is measured by the same standard as finality for appealability purposes. *Gresham Park Community Org. v. Howell*, 652 F.2d 1227 (5th Cir. 1981).

Absent final judgment or certificate of immediate review, appeal is premature and must be dismissed. *Marsh v. Allgood*, 118 Ga. App. 773, 165 S.E.2d 479 (1968); *Moore v. Georgia Power Co.*, 122 Ga. App. 54, 176 S.E.2d 236 (1970); *Foskey v. Bank of Alapaha*, 147 Ga. App. 541, 249 S.E.2d 346 (1978); *Ward v. Charles D. Hardwick Co.*, 149 Ga. App. 546, 254 S.E.2d 872 (1979).

Where there is no certificate of review and case does not fall within class of exceptions found in section, appeal must be dismissed. *Thompson v. Consumer Credit of Valdosta, Inc.*, 123 Ga. App. 281, 180 S.E.2d 595 (1971).

Where a final judgment has not been entered nor a certificate of immediate review granted, either by the trial court or the appellate court, an appeal is premature and must be dismissed. *Bowers v. Price*, 168 Ga. App. 125, 308 S.E.2d 420 (1983).

As to judgments that are not final, compliance with subsection (b) is prerequisite to appeal. *Harwell v. State*, 127 Ga. App. 204, 193 S.E.2d 257 (1972).

A party seeking appellate review from an interlocutory order must follow the interlocutory-application subsection, subsection (b), seek a certificate of immediate review from the trial court, and comply with the time limitations therein. *Scruggs v. Georgia Dep't of Human Resources*, 261 Ga. 587, 408 S.E.2d 103 (1991); *Collier v. Evans*, 205 Ga. App. 764, 423 S.E.2d 704 (1992).

Interlocutory rulings are not appealable absent following procedure outlined in subsection (b). *Insurance Co. of N. Am. v. Fowler*, 148 Ga. App. 509, 251 S.E.2d 594 (1978), overruled on other grounds, *Seaboard Coast Line R.R. v. Mobile Chem. Co.*, 172 Ga. App. 543, 323 S.E.2d 849 (1984).

General Consideration (Cont'd)
2. Construction in General (Cont'd)

An interlocutory appeal is cognizable only if trial judge issues certificate of immediate review and appellate court grants permission for direct appeal pursuant to application filed in accordance with subsection (b). *Becker v. Bishop*, 151 Ga. App. 224, 259 S.E.2d 209 (1979); *Wolf v. Richmond County Hosp. Auth.*, 169 Ga. App. 68, 311 S.E.2d 507 (1983).

Failure to comply with the interlocutory appeal procedure set forth in subsection (b), causes the appeal to be premature and it must be dismissed. *English v. Tucker Fed. Sav. & Loan Ass'n*, 175 Ga. App. 69, 332 S.E.2d 365 (1985).

Effect of failure to appeal from interlocutory order. — Although the court of appeals has considered orders on motions to set aside condemnations on direct appeal, when an appeal is taken from a final judgment, all judgments, rulings, or orders rendered in the case which are raised on appeal will be considered, whether or not the earlier ruling was appealable. *Skipper v. DOT*, 197 Ga. App. 634, 399 S.E.2d 538 (1990).

Term "court below" is construed to be court whose judgment is sought to be appealed. *J.T.M. v. State*, 142 Ga. App. 635, 236 S.E.2d 764 (1977).

Paragraph (a)(1) of this section and § 9-11-54(b) are to be construed together so that determination of finality under latter satisfies finality requirement of former. *Thompson v. Clarkson Power Flow, Inc.*, 149 Ga. App. 284, 254 S.E.2d 401, *aff'd*, 244 Ga. 300, 260 S.E.2d 9 (1979).

Interpretation of intended relationship among individual paragraphs and subsections of section. — See *Springtime, Inc. v. Douglas County*, 228 Ga. 753, 187 S.E.2d 874 (1972) (decided under former Code 1933, § 6-701 as it read prior to rearrangement of paragraphs and subsections to present form).

This section's definition of final judgment applies to § 15-11-64. — Section 15-11-64 provides for appeals from final judgments of juvenile court judge, without defining final judgments, this section provides for appeals where judgment is final — that is to say — where cause is no longer pending in court below. *J.T.M. v. State*, 142 Ga. App. 635, 236 S.E.2d 764 (1977).

This section is determinative as to finality of judgments entered under T. 44, Ch. 14, Art. 7, Part 4. *Jordan v. Ford Motor Credit Co.*, 147 Ga. App. 515, 249 S.E.2d 327 (1978).

Defendants could not challenge the ruling. — Defendants could not challenge the ruling from which they now seek relief because it was not entered until after the prior appeal was concluded. *Turner Constr. Co. v. Electrical Distribs., Inc.*, 202 Ga. App. 726, 415 S.E.2d 325 (1992).

Where court grants motion to dismiss and denies another defendant's motion to dismiss, filed on other grounds, and the plaintiff appeals, but the dismissal order contains no express determination that there is no just reason for delay, and there is no express direction for the entry of such judgment, the appeal is premature and must be dismissed, even where the trial court grants a certificate for immediate review. *All Risk Ins. Agency, Inc. v. Rockbridge San. Co.*, 166 Ga. App. 728, 305 S.E.2d 390 (1983).

Denial of judgment n.o.v. appealable, even where new trial granted. — A denial of a judgment notwithstanding the verdict can be considered on appeal even though a motion for a new trial has been granted, if an appeal is taken from a final judgment entered pursuant to § 9-11-54(b) (judgments upon multiple claims or multiple parties). *GMAC v. Bowen Motors, Inc.*, 167 Ga. App. 463, 306 S.E.2d 675 (1983).

Appeal from "motion to compel settlement" was dismissed since the appeal was actually intended to be taken from an interlocutory order rather than from the "final outcome" of the case, and no amendment had been filed to correct this defect. *Martin v. Farrington*, 179 Ga. App. 227, 346 S.E.2d 5 (1986).

Filing of motion to set aside summary judgment is ineffective as extender of time for filing notice of appeal. *Gulf Oil Co. v. Mantegna*, 167 Ga. App. 844, 307 S.E.2d 732 (1983).

Cited in *Gibson v. Hodges*, 221 Ga. 779, 147 S.E.2d 329 (1966); *Birdwell v. Pippen*, 113 Ga. App. 202, 147 S.E.2d 673 (1966); *Seaton v. Redisco, Inc.*, 113 Ga. App. 256, 147 S.E.2d 828 (1966); *Williams v. Shaffer*, 222 Ga. 334, 149 S.E.2d 668 (1966); *Knopp v. Knopp*, 222 Ga. 388, 149 S.E.2d 680 (1966); *Dawn Mem. Park v. Southern Cem. Consult-*

ants of Ga., Inc., 113 Ga. App. 814, 149 S.E.2d 760 (1966); White Oak Acres, Inc. v. Campbell, 113 Ga. App. 833, 149 S.E.2d 870 (1966); Algernon Blair, Inc. v. National Sur. Corp., 222 Ga. 672, 151 S.E.2d 724 (1966); Undercofler v. Grantham Transf. Co., 222 Ga. 654, 151 S.E.2d 765 (1966); Hartsfield Co. No. 3, Inc. v. Williams, 114 Ga. App. 547, 151 S.E.2d 908 (1966); Kahn v. Graper, 114 Ga. App. 572, 152 S.E.2d 10 (1966); State Hwy. Dep't v. Kirchmeyer, 114 Ga. App. 433, 152 S.E.2d 17 (1966); Richmond County Bus. Ass'n v. Richmond County, 222 Ga. 772, 152 S.E.2d 738 (1966); Undercofler v. Grantham Transf. Co., 114 Ga. App. 868, 152 S.E.2d 900 (1966); Wiggins v. Wiggins, 223 Ga. 63, 153 S.E.2d 306 (1967); Nunn v. National Life & Accident Ins. Co., 115 Ga. App. 131, 153 S.E.2d 730 (1967); Norbo Trading Corp. v. Wohlmuth, 223 Ga. 258, 154 S.E.2d 224 (1967); Dudley v. Sears, Roebuck & Co., 115 Ga. App. 411, 154 S.E.2d 699 (1967); Garnto v. German, 115 Ga. App. 418, 154 S.E.2d 742 (1967); Griffith v. Morgan, 115 Ga. App. 518, 154 S.E.2d 822 (1967); Hulsey v. Smith, 223 Ga. 522, 156 S.E.2d 353 (1967); Nye v. Murcel Mfg. Co., 116 Ga. App. 44, 156 S.E.2d 383 (1967); Kirkman v. Miller, 116 Ga. App. 78, 156 S.E.2d 558 (1967); Hayes v. State, 116 Ga. App. 260, 157 S.E.2d 30 (1967); Rogers v. Johnson, 116 Ga. App. 295, 157 S.E.2d 48 (1967); State Hwy. Dep't v. Thomason, 116 Ga. App. 330, 157 S.E.2d 503 (1967); Biddinger v. Fletcher, 116 Ga. App. 532, 157 S.E.2d 764 (1967); Graves v. State, 116 Ga. App. 494, 157 S.E.2d 801 (1967); Wilbanks v. State, 116 Ga. App. 698, 158 S.E.2d 274 (1967); Harrington v. Frye, 116 Ga. App. 755, 159 S.E.2d 84 (1967); Passmore v. Truman & Smith Inst., Inc., 116 Ga. App. 803, 159 S.E.2d 92 (1967); Peacock Constr. Co. v. Turner Concrete, Inc., 116 Ga. App. 822, 159 S.E.2d 114 (1967); Whitus v. Georgia, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967); Veal v. Paulk, 117 Ga. App. 109, 159 S.E.2d 304 (1968); Davis v. Holt, 224 Ga. 55, 159 S.E.2d 403 (1968); Titshaw v. Carnes, 224 Ga. 57, 159 S.E.2d 420 (1968); Watson v. Parke, Davis & Co., 117 Ga. App. 162, 159 S.E.2d 446 (1968); Williams v. State, 117 Ga. App. 79, 159 S.E.2d 454 (1968); Wright v. Collins, 117 Ga. App. 105, 159 S.E.2d 468 (1968); Robert Chuckrow Constr. Co. v. Gough, 117 Ga. App. 140, 159 S.E.2d 469 (1968); First Fed. Sav. & Loan Ass'n v. First

Nat'l Bank, 224 Ga. 150, 160 S.E.2d 372 (1968); Lloyd Indus., Inc. v. O'Neal Steel, Inc., 117 Ga. App. 328, 160 S.E.2d 433 (1968); Zappa v. Ewing, 117 Ga. App. 362, 160 S.E.2d 640 (1968); Whitus v. State, 117 Ga. App. 359, 160 S.E.2d 839 (1968); Woods v. State, 117 Ga. App. 546, 160 S.E.2d 922 (1968); Housing Auth. v. Hindman, 224 Ga. 246, 161 S.E.2d 292 (1968); McLeod v. Westmoreland, 117 Ga. App. 659, 161 S.E.2d 335 (1968); Graham v. Haley, 224 Ga. 498, 162 S.E.2d 346 (1968); Howard v. Thomas, 224 Ga. 515, 162 S.E.2d 721 (1968); Vulcan Life & Accident Ins. Co. v. United Banking Co., 118 Ga. App. 36, 162 S.E.2d 798 (1968); Young v. Reese, 118 Ga. App. 114, 162 S.E.2d 831 (1968); Wells v. Johnson, 118 Ga. App. 168, 162 S.E.2d 837 (1968); George v. Lee, 118 Ga. App. 302, 163 S.E.2d 262 (1968); Califon Constr. Co. v. Highland Apts., 224 Ga. 610, 163 S.E.2d 744 (1968); Collins v. Southside Lumber Co., 118 Ga. App. 342, 163 S.E.2d 755 (1968); Rockmart Fin. Co. v. High, 118 Ga. App. 351, 163 S.E.2d 758 (1968); Berg v. Berg, 118 Ga. App. 353, 163 S.E.2d 888 (1968); Nugent v. Willis, 118 Ga. App. 335, 163 S.E.2d 891 (1968); Babb v. International Shoe Co., 118 Ga. App. 346, 163 S.E.2d 893 (1968); Lloyd Indus., Inc. v. O'Neal Steel, Inc., 118 Ga. App. 377, 163 S.E.2d 894 (1968); Greene v. Atlantis Realty Co., 118 Ga. App. 400, 163 S.E.2d 895 (1968); Goldberg v. Monroe, 224 Ga. 693, 164 S.E.2d 123 (1968); Lamas Co. v. Baldwin, 118 Ga. App. 437, 164 S.E.2d 236 (1968); State Hwy. Dep't v. Rosenfeld, 118 Ga. App. 524, 164 S.E.2d 259 (1968); Clarke v. Robinson, 118 Ga. App. 525, 164 S.E.2d 260 (1968); Tenneco Oil Co. v. Mullis, 118 Ga. App. 540, 164 S.E.2d 312 (1968); Mize v. Rampey, 224 Ga. 806, 164 S.E.2d 816 (1968); Davis v. Dixon, 118 Ga. App. 587, 164 S.E.2d 875 (1968); Nevels v. Ingram, 118 Ga. App. 644, 164 S.E.2d 916 (1968); Georgia Hwy. Express Co. v. Do-All Chem. Co., 118 Ga. App. 736, 165 S.E.2d 429 (1968); Terry v. Warner Robins Supply Co., 225 Ga. 5, 165 S.E.2d 731 (1969); Harris v. State, 118 Ga. App. 848, 166 S.E.2d 94 (1969); Housing Auth. v. Baker, 119 Ga. App. 109, 166 S.E.2d 437 (1969); D.G. Mach. & Gage Co. v. Hardy, 119 Ga. App. 194, 166 S.E.2d 580 (1969); Dorsey v. Hood, 119 Ga. App. 237, 166 S.E.2d 635 (1969); Nalley v. Aiken, 119 Ga. App. 406, 167 S.E.2d 239 (1969); McKinnon

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280 S.E.2d 387 (1981); Kaigler v. Folsom, 158 Ga. App. 311, 281 S.E.2d 250 (1981); Bullock v. City of Dallas, 248 Ga. 164, 281 S.E.2d 613 (1981); Bell v. Rodgers, 158 Ga. App. 507, 281 S.E.2d 647 (1981); Citibank v. Hill, 158 Ga. App. 574, 281 S.E.2d 650 (1981); Carmichael v. Carmichael, 248 Ga. 216, 282 S.E.2d 71 (1981); McDowell v. State, 158 Ga. App. 712, 282 S.E.2d 125 (1981); Pierce v. Gaskins, 158 Ga. App. 864, 282 S.E.2d 776 (1981); Commercial Union Assurance Cos. v. Holbert, 159 Ga. App. 374, 283 S.E.2d 337 (1981); Sanders v. Colwell, 248 Ga. 376, 283 S.E.2d 461 (1981); Cole v. Sheraton Atlanta Corp., 159 Ga. App. 439, 283 S.E.2d 668 (1981); Walker v. Walker, 159 Ga. App. 583, 284 S.E.2d 89 (1981); Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981); Deans v. Kingston Dev. Corp., 248 Ga. 557, 285 S.E.2d 11 (1981); Attwell v. Sears, Roebuck & Co., 159 Ga. App. 811, 285 S.E.2d 199 (1981); Coffey Enter. Realty & Dev. Co. v. DOT, 159 Ga. App. 903, 286 S.E.2d 44 (1981); Grantham v. Nelson, 160 Ga. App. 68, 286 S.E.2d 59 (1981); Atlanta News Agency, Inc. v. MacConochie Constr. Co., 160 Ga. App. 306, 287 S.E.2d 314 (1981); Theo v. DOT, 160 Ga. App. 518, 287 S.E.2d 333 (1981); City of Atlanta v. West, 160 Ga. App. 609, 287 S.E.2d 558 (1981); Georgia Farm Bureau Mut. Ins. Co. v. Stevenson, 160 Ga. App. 805, 287 S.E.2d 662 (1982); Cohran v. Jones, 160 Ga. App. 761, 288 S.E.2d 80 (1981); Cohran v. Carlin, 160 Ga. App. 762, 288 S.E.2d 81 (1981); Underhill v. Barnes, 161 Ga. App. 776, 288 S.E.2d 905 (1982); Teledyne Indus., Inc. v. Patron Aviation, Inc., 161 Ga. App. 596, 288 S.E.2d 911 (1982); Wiley v. Williams, 161 Ga. App. 601, 289 S.E.2d 27 (1982); Small v. Auto Rental & Leasing, Inc., 248 Ga. 665, 289 S.E.2d 246 (1981); Widener v. Ravenscroft, 161 Ga. App. 12, 289 S.E.2d 257 (1982); Fagala v. Morrison, 161 Ga. App. 655, 289 S.E.2d 528 (1982); Calloway v. Calloway, 161 Ga. App. 752, 289 S.E.2d 559 (1982); Lockman v. Catawba Ins. Co., 162 Ga. App. 244, 291 S.E.2d 99 (1982); In re L.B.B., 162 Ga. App. 257, 291 S.E.2d 108 (1982); Cohran v. Carlin, 249 Ga. 510, 291 S.E.2d 538 (1982); Equitable Life Assurance Soc'y v. Sullivan, 164 Ga. App. 552, 292

S.E.2d 567 (1982); Thomas v. Waldrup, 162 Ga. App. 721, 293 S.E.2d 354 (1982); Smiley v. State, 164 Ga. App. 12, 296 S.E.2d 209 (1982); Marshall Erdman & Assocs. v. Georgia State Bd. for Examination, Qualification & Registration of Architects, 164 Ga. App. 283, 296 S.E.2d 219 (1982); Northside Cleaners, Inc. v. Paleologou, 163 Ga. App. 827, 296 S.E.2d 361 (1982); Echols v. State, 163 Ga. App. 905, 296 S.E.2d 366 (1982); Wallace v. Scott, 164 Ga. App. 129, 296 S.E.2d 423 (1982); Westberry v. Saunders, 250 Ga. 240, 296 S.E.2d 596 (1982); Chadwick v. Frix, 165 Ga. App. 20, 299 S.E.2d 93 (1983); Fast Freight Transf., Inc. v. Buffington, 165 Ga. App. 138, 299 S.E.2d 422 (1983); Equitable Life Assurance Soc'y v. Sullivan, 165 Ga. App. 223, 299 S.E.2d 615, cert. denied, Wills v. McAuley, 166 Ga. App. 4, 303 S.E.2d 26, 251 Ga. 41, 305 S.E.2d 120 (1983); Georgia Farm Bureau Mut. Ins. Co. v. Ritchie, 165 Ga. App. 298, 300 S.E.2d 550 (1983); Whatley v. Blue Cross of Ga./Columbus, Inc., 165 Ga. App. 340, 301 S.E.2d 60 (1983); Smith v. Smith, 162 Ga. App. 532, 301 S.E.2d 696 (1983); Phillips Constr. Co. v. Cowart Iron Works, Inc., 165 Ga. App. 605, 302 S.E.2d 142 (1983); Porter v. Calhoun County Bd. of Comm'rs, 167 Ga. App. 53, 306 S.E.2d 58 (1983); Union Indem. Ins. Co. v. Cherokee Ins. Co., 168 Ga. App. 82, 308 S.E.2d 238 (1983); Regante v. Reliable-Triple Cee of N. Jersey, Inc., 251 Ga. 629, 308 S.E.2d 372 (1983); Scott v. Liberty Mut. Ins. Co., 168 Ga. App. 815, 310 S.E.2d 772 (1983); Jones v. Singleton, 253 Ga. 41, 316 S.E.2d 154 (1984); Beckman v. Black, 170 Ga. App. 193, 316 S.E.2d 784 (1984); Howard v. Collins, 170 Ga. App. 362, 317 S.E.2d 630 (1984); Miller v. State, 171 Ga. App. 222, 319 S.E.2d 79 (1984); Schieffelin & Co. v. Strickland, 253 Ga. 385, 320 S.E.2d 358 (1984); United Food & Com. Workers Union v. Amberjack Ltd., 253 Ga. 438, 321 S.E.2d 736 (1984); Carter v. Landel/Arundel, Inc., 172 Ga. App. 115, 322 S.E.2d 108 (1984); Life for God's Stray Animals, Inc. v. New N. Rockdale County Homeowners Ass'n, 253 Ga. 551, 322 S.E.2d 239 (1984); State v. Cook, 172 Ga. App. 433, 323 S.E.2d 634 (1984); Welch v. State, 172 Ga. App. 654, 324 S.E.2d 488 (1984); Calhoun Clinic, P.C. v. Raju, 173 Ga. App. 320, 326 S.E.2d 529 (1985); Cable Holdings of Battlefield, Inc. v. Lookout Cable Serv.,

Inc., 173 Ga. App. 355, 326 S.E.2d 552 (1985); James v. Allen, 173 Ga. App. 636, 327 S.E.2d 501 (1985); Collier v. Rogers, 173 Ga. App. 621, 327 S.E.2d 588 (1985); Malpass v. State, 173 Ga. App. 690, 327 S.E.2d 753 (1985); Robinson v. Robinson, 174 Ga. App. 656, 331 S.E.2d 8 (1985); Olympic Dev. Group, Inc. v. American Druggists' Ins. Co., 175 Ga. App. 425, 333 S.E.2d 622 (1985); State v. Thomas, 176 Ga. App. 106, 335 S.E.2d 697 (1985); Pinyan v. Hamby, 176 Ga. App. 411, 336 S.E.2d 331 (1985); Boatright v. Sunshine Toyota, Inc., 177 Ga. App. 332, 339 S.E.2d 275 (1985); Brown v. Associates Fin. Servs. Corp., 255 Ga. 457, 339 S.E.2d 590 (1986); All Am. Assurance Co. v. Brown, 177 Ga. App. 402, 339 S.E.2d 611 (1985); Butler v. Gray, 177 Ga. App. 498, 339 S.E.2d 769 (1986); Barikos v. Vanderslice, 177 Ga. App. 884, 341 S.E.2d 513 (1986); Nazerian v. City of McCaysville, 178 Ga. App. 27, 342 S.E.2d 11 (1986); Days Inn of Am., Inc. v. Sharkey, 178 Ga. App. 718, 344 S.E.2d 518 (1986); Sidwell v. Wheeler, 178 Ga. App. 732, 344 S.E.2d 527 (1986); Preferred Risk Mut. Ins. Co. v. Laube, 181 Ga. App. 579, 353 S.E.2d 203 (1987); Crolley v. State, 182 Ga. App. 2, 354 S.E.2d 864 (1987); Neal v. State, 182 Ga. App. 37, 354 S.E.2d 664 (1987); Powell v. State, 182 Ga. App. 123, 355 S.E.2d 72 (1987); Travelers Indem. Co. v. Schenden, 182 Ga. App. 735, 356 S.E.2d 761 (1987); Williams v. Natalie Townhouses of Inman Park Condominium Ass'n, 182 Ga. App. 815, 357 S.E.2d 156 (1987); Georgia Am. Ins. Co. v. Mills, 183 Ga. App. 707, 359 S.E.2d 697 (1987); Isaacs v. State, 257 Ga. 798, 364 S.E.2d 567 (1988); Hardman v. Hardman, 185 Ga. App. 519, 364 S.E.2d 645 (1988); Stewart v. State, 185 Ga. App. 647, 365 S.E.2d 498 (1988); Gourmet Delights, Inc. v. Edgewater Country Club, Inc., 185 Ga. App. 660, 365 S.E.2d 514 (1988); Crolley v. Johnson, 185 Ga. App. 671, 365 S.E.2d 277 (1988); Jonquil City Contractors v. Augustine, 186 Ga. App. 915, 369 S.E.2d 55 (1988); Leeks v. State, 188 Ga. App. 625, 373 S.E.2d 777 (1988); Atlanta Dev. Co. v. Peel & Sons, 189 Ga. App. 453, 377 S.E.2d 552 (1988); Baynes v. State, 189 Ga. App. 797, 377 S.E.2d 708 (1989); Simons v. Equitec Properties Co., 190 Ga. App. 804, 380 S.E.2d 90 (1989); Bailey v. State, 259 Ga. 340, 380 S.E.2d 264 (1989); Reese v. Georgia Power Co., 191 Ga. App. 125, 381 S.E.2d 110

(1989); Klein v. Standard Fire Ins. Co., 191 Ga. App. 417, 382 S.E.2d 158 (1989); LDS Social Servs. Corp. v. Richins, 191 Ga. App. 695, 382 S.E.2d 607 (1989); Abercrombie v. Miller, 191 Ga. App. 858, 383 S.E.2d 358 (1989); Camelback Mgt. Co. v. Phoenix Periodicals, Inc., 192 Ga. App. 101, 383 S.E.2d 651 (1989); Mitchell v. Wyatt, 192 Ga. App. 127, 384 S.E.2d 227 (1989); Friedman v. Friedman, 259 Ga. 530, 384 S.E.2d 641 (1989); McClure v. Gower, 259 Ga. 678, 385 S.E.2d 271 (1989); Pettus v. Paylay, Frank & Brown, 193 Ga. App. 335, 387 S.E.2d 613 (1989); DOT v. B & G Realty, Inc., 193 Ga. App. 649, 388 S.E.2d 749 (1989); First Union Nat'l Bank v. Cumberland Creek Country Club, 194 Ga. App. 332, 390 S.E.2d 422 (1990); Lewis v. McDowell, 194 Ga. App. 429, 390 S.E.2d 605 (1990); Barber v. Collins, 194 Ga. App. 385, 390 S.E.2d 633 (1990); Raymer v. Foster & Cooper, Inc., 195 Ga. App. 200, 393 S.E.2d 49 (1990); Monroe v. Brooks, 195 Ga. App. 310, 393 S.E.2d 463 (1990); Wallace v. Meyer, 260 Ga. 253, 394 S.E.2d 350 (1990); Miller v. Jeff Davis Apts., Ltd. II, 196 Ga. App. 600, 396 S.E.2d 494 (1990); Atlantic Wood Indus., Inc. v. Lumbermen's Underwriting Alliance, 196 Ga. App. 503, 396 S.E.2d 541 (1990); Acme Fence Co. v. DOT, 197 Ga. App. 187, 397 S.E.2d 622 (1990); International Serv. Ins. Co. v. Harter, 197 Ga. App. 481, 398 S.E.2d 705 (1990); Aetna Cas. & Sur. Co. v. Cantrell, 197 Ga. App. 672, 399 S.E.2d 237 (1990); Landor Condominium Consultants, Inc. v. Bankers First Fed. Sav. & Loan Ass'n, 198 Ga. App. 274, 401 S.E.2d 305 (1991); Williams v. Opriciu, 198 Ga. App. 663, 402 S.E.2d 744 (1991); Artis v. Gaither, 199 Ga. App. 114, 404 S.E.2d 322 (1991); Wood v. State, 199 Ga. App. 252, 404 S.E.2d 589 (1991); Hunter v. Roberts, 199 Ga. App. 318, 404 S.E.2d 645 (1991); Gillis v. Goodgame, 199 Ga. App. 413, 404 S.E.2d 815 (1991); In re J.B., 199 Ga. App. 593, 405 S.E.2d 574 (1991); Serco Co. v. Choice Bumper, Inc., 199 Ga. App. 846, 406 S.E.2d 276 (1991); Lawson v. Athens Auto Supply & Elec., Inc., 200 Ga. App. 609, 409 S.E.2d 60 (1991); Sorrentino v. Boston Mut. Life Ins. Co., 206 Ga. App. 771, 426 S.E.2d 594 (1992); Lumbermen's Underwriting Alliance v. Atlantic Wood Indus., Inc., 207 Ga. App. 392, 427 S.E.2d 861 (1993); Wilson v. Southern Ry., 208 Ga. App. 598, 431 S.E.2d 383 (1993); Commerce

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Properties, Inc. v. Linthicum, 209 Ga. App. 853, 434 S.E.2d 769 (1993); *Fairburn Banking Co. v. Gafford*, 263 Ga. 792, 439 S.E.2d 482 (1994); *Marshall v. Ricmar, Inc.*, 215 Ga. App. 470, 451 S.E.2d 515 (1994).

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Dismissal of complaint against one of two defendants for failure to set forth facts establishing venue as to that defendant not a final, appealable judgment, as the action remained pending against the other defendant. *Coley Fertilizer Co. v. Gold Kist, Inc.*, 174 Ga. App. 471, 330 S.E.2d 597 (1985).

Dismissal of complaint against one of two defendants. — An order entered by a county superior court which stated that plaintiff had no claim against a county sheriff but allowed the filing of plaintiff's complaint against a county law enforcement employee does not constitute a final order of disposition from which plaintiff may appeal. *Howard v. Wilkes*, 191 Ga. App. 239, 382 S.E.2d 434 (1989).

Dismissal of complaint without dismissal of counterclaim. — The voluntary dismissal of a complaint by a party is not a final judgment within the meaning of this section where a counterclaim filed by the other side was never actually dismissed. *Memorial Medical Ctr., Inc. v. Moore*, 184 Ga. App. 176, 361 S.E.2d 49 (1987); *Chatham County Hosp. Auth. v. Mack*, 185 Ga. App. 13, 363 S.E.2d 264 (1987).

Dismissal of claims where other claims pending not appealable order. — Trial court's order dismissing claims was not an appealable final order because claims remained pending in the trial court, and the trial court did not direct entry of final judgment; additionally, there was no compliance with interlocutory appeals procedure. *Church v. Bell*, 213 Ga. App. 44, 443 S.E.2d 677 (1994).

Denial of a protective order. — The granting of a protective order denying defendant's discovery motion left defendant with no further recourse entitling him to direct appeal. *R.J. Reynolds Tobacco Co. v. Fischer*, 207 Ga. App. 292, 427 S.E.2d 810 (1993).

New trial for fewer than all defendants. — Both the order granting the plaintiffs a new

trial as to one defendant and the order denying their motion for a new trial as to the other defendant were nonfinal and interlocutory orders and, as such, did not otherwise finally dispose of plaintiffs' motion for new trial so as to render the underlying judgment in favor of both defendants final and directly appealable by them. *Crumbley v. Wyant*, 183 Ga. App. 802, 360 S.E.2d 276, cert. denied, 183 Ga. App. 905, 360 S.E.2d 276 (1987).

Lack of notice of trial. — A ruling on a motion to set aside the verdict and judgment for a new trial based on a lack of notice of trial is subject to direct review as a motion for a new trial, where the lack of notice is based on a defect not appearing upon the face of the record. *Hill v. Bailey*, 187 Ga. App. 413, 370 S.E.2d 520 (1988).

In absence of any judgment, ruling, or order rendered by court on motions for summary judgment and for certification of the action as a class action, the motions and other enumerations of alleged error dependent upon rulings on the motions are not yet ripe for review by the appellate courts. *Stoddard v. Board of Tax Assessors*, 173 Ga. App. 467, 326 S.E.2d 827 (1985).

The denial of a motion to intervene is not a final judgment; thus, it is reviewable under the interlocutory appeal procedure. *Morman v. Board of Regents*, 198 Ga. App. 544, 402 S.E.2d 320 (1991).

Trial court's order denying a motion to recuse was not a "final judgment," and required an application for interlocutory review. *Rolleston v. Glynn County Bd. of Tax Assessors*, 213 Ga. App. 552, 445 S.E.2d 345 (1994).

Grant of motion to set aside judgment, like grant of motion for new trial, leaves case still pending in court below and thus is not a final judgment. *Franklin v. Collins*, 162 Ga. App. 755, 293 S.E.2d 364 (1982).

Where default judgment is set aside by trial court based on finding that it never acquired jurisdiction over nonresident defendants but where no dismissal motion has in fact been filed and no dismissal ordered, and there is no compliance with interlocutory appeal procedures, the appeal is premature and must be dismissed. *Walton v. Collins*, 172 Ga. App. 736, 324 S.E.2d 574 (1984).

The grant of an application to compel arbitration is not equitable in nature, but

operates merely to stay further proceedings in a pending action when entered by the court in which the action is pending and is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. Consequently, the order granting motion to compel arbitration did not constitute an equitable injunction directly appealable pursuant to subsection (a)(4) of this section, but resolves an interlocutory matter reviewable pursuant to subsection (b) of this section. *McAllister v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 212 Ga. App. 697, 443 S.E.2d 9 (1994).

The grant of an application to compel arbitration is not directly appealable pursuant to paragraph (a)(4), but is instead an interlocutory matter reviewable pursuant to subsection (b) which requires obtaining a certificate of immediate review from the trial court. *Pace Constr. Corp. v. Northpark Assocs.*, 215 Ga. App. 438, 450 S.E.2d 828 (1994).

Denial of motion for acquittal based on § 17-7-170 appealable. — Although not technically a final judgment, the denial of a motion to dismiss (more properly, a motion for acquittal) based upon § 17-7-170 is directly appealable under subsection (a). *Cook v. State*, 183 Ga. App. 720, 359 S.E.2d 716 (1987).

Denial of motion to set aside is appealable as a matter of right. *Dudley v. Monsour*, 155 Ga. App. 269, 270 S.E.2d 686 (1980).

The denial of a motion to set aside is not a final appealable judgment where a counterclaim is still pending. The appeal must be dismissed, notwithstanding a final judgment has since been entered in the case, where no appeal has been filed thereafter. *Gulf Oil Co. v. Mantegna*, 167 Ga. App. 844, 307 S.E.2d 732 (1983).

Order setting aside default judgment is final in establishing liability of appellee, and it is appealable notwithstanding fact that there was no final adjudication of case in lower court. *Byrd v. Moore Ford Co.*, 116 Ga. App. 292, 157 S.E.2d 41 (1967).

Judgment on complaint in equity setting aside default judgment is a final judgment, and appeals from it are not subject to dismissal where they emanate from same court, involve same parties, and pertain to same

default judgment. *Cochran v. Levitz Furn. Co.*, 249 Ga. 504, 291 S.E.2d 535 (1982).

Post-judgment interrogatories. — A direct appeal of an order to respond to post-judgment interrogatories was improper, where the disputed discovery remained unanswered, and therefore, matters remained pending, so that the trial court's order was not final, and therefore appealable only by compliance with subsection (b) of this Code section. *Cornelius v. Finley*, 204 Ga. App. 299, 418 S.E.2d 815 (1992); *Dial v. Bent Tree Nat'l Bank*, 215 Ga. App. 620, 451 S.E.2d 533 (1994).

Declaratory judgments have the force and effect of final judgments and are reviewable as such. *Sunstates Refrigerated Servs., Inc. v. Griffin*, 215 Ga. App. 61, 449 S.E.2d 858 (1994).

Order directing accounting. — Paragraph (a)(3), allowing direct appeal of a judgment or order "directing that an accounting be had," does not provide for a direct appeal of all orders appointing an auditor; thus, the relief requested in the complaint must be reviewed to determine the appropriateness of a direct appeal. *Parmar v. Khera*, 215 Ga. App. 71, 449 S.E.2d 894 (1994).

In a declaratory judgment action for dissolution of a partnership, an accounting, and damages, direct appeal of a sua sponte order for the appointment of an auditor was appropriate. *Parmar v. Khera*, 215 Ga. App. 71, 449 S.E.2d 894 (1994).

Order denying application for leave to file quo warranto is an appealable judgment under subsection (a) of this section. *Thibadeau v. Henley*, 233 Ga. 884, 213 S.E.2d 657 (1975).

Order finding contempt. — A direct appeal may be taken from an order holding one in contempt of court. *Manning v. MNC Consumer Dist. Co.*, 212 Ga. App. 824, 442 S.E.2d 919 (1994).

Refusal to grant written motion for speedy trial. — Refusal by judge of superior court to grant to defendant in criminal case not affecting his life his written motion for speedy trial pursuant to constitutional right thereto is an appealable judgment under this section. *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Overruling of general demurrer (now motion to dismiss) to election contest proceeding is appealable. *Blackburn v. Hall*, 115 Ga.

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App. 235, 154 S.E.2d 392 (1967).

Order denying motion to strike voluntary dismissal is appealable. *Pizza Ring Enters., Inc. v. Mills Mgt. Sources, Inc.*, 154 Ga. App. 45, 267 S.E.2d 487 (1980).

Denial of motion authorized by § 9-11-60 to set aside and vacate judgment is final and appealable under this section. *Farr v. Farr*, 120 Ga. App. 762, 172 S.E.2d 158 (1969).

Judgment on petition for writ of habeas corpus is a final judgment from which appeal can and must be taken within 30 days after it is rendered. *Dismuke v. State*, 229 Ga. 347, 190 S.E.2d 915 (1972).

Judgment that no compensation is to be paid to condemnor in condemnation proceeding. — Where property is condemned and judgment provides that no compensation is to be paid by condemnor, there is no question to be presented to jury as to value, and such judgment is final and subject to review without certificate. *City of Atlanta v. Turner Adv. Co.*, 234 Ga. 1, 214 S.E.2d 501 (1975).

Dismissal of appeal by trial court from order granting interlocutory injunction. — Because this section allows direct appeal from order granting interlocutory injunction, dismissal of such appeal by trial court is likewise appealable without certificate of review. *Azar v. Baird*, 232 Ga. 81, 205 S.E.2d 273 (1974).

Order requiring action that can affect rights of parties. — Order is appealable if it requires action that can affect rights of parties to litigation. Such order is in nature of interlocutory mandatory injunction which is appealable under this section. *Padgett v. Cowart*, 232 Ga. 633, 208 S.E.2d 455 (1974).

Order merely stating "defendant's motion to dismiss is granted." — Where court did not use language "dismissed," or "petition is dismissed," but merely "defendant's motion to dismiss is hereby granted," this was a final judgment within meaning of section. *Lawler v. Georgia Mut. Ins. Co.*, 156 Ga. App. 265, 276 S.E.2d 646 (1980), overruled on other grounds, *Becker v. Fairman*, 167 Ga. App. 708, 307 S.E.2d 520 (1983).

A judgment of reversal by the superior court is not a final judgment within the meaning of paragraph (a)(1) of this section

where the case is remanded to the lower tribunal for further consideration. *Mayor of Hinesville v. Gastin*, 178 Ga. App. 776, 344 S.E.2d 744 (1986).

The denial of a plea in bar asserting immunity from prosecution pursuant to § 19-7-5(d) does not constitute a final judgment, nor is the order otherwise directly appealable. *Austin v. State*, 179 Ga. App. 235, 345 S.E.2d 688 (1986).

Order overruling defendant's traverse in garnishment proceedings was a final judgment where court ordered funds paid into court to be distributed. *Perry v. Freeman*, 163 Ga. App. 186, 293 S.E.2d 381 (1982).

A pretrial order granting a motion to cancel a notice of lis pendens falls within the small class of cases beyond the confines of the final-judgment rule and is directly appealable. *Scroggins v. Edmondson*, 250 Ga. 430, 297 S.E.2d 469 (1982).

Denial of timely filed plea of double jeopardy is appealable without resort to the interlocutory appeal procedures of subsection (b) of this section, where the plea is filed sufficiently in advance of trial so as not to constitute a delaying device. *Patterson v. State*, 248 Ga. 875, 287 S.E.2d 7 (1982).

A timely filed plea of double jeopardy is directly appealable without resort to the interlocutory appeal procedures set forth in this section. *Rogers v. State*, 166 Ga. App. 299, 304 S.E.2d 108 (1983).

The denial of the defendant's double jeopardy pleas may be appealed without application and certification, which otherwise would be required under subsection (b) of this section. *Young v. State*, 251 Ga. 153, 303 S.E.2d 431 (1983).

A timely filed appeal from the denial of a plea of former jeopardy may be made directly to the Court of Appeals. *Nave v. State*, 166 Ga. App. 466, 304 S.E.2d 491 (1983).

The denial of a plea of former jeopardy is directly appealable without resort to interlocutory appeal procedures. *Bishop v. State*, 176 Ga. App. 357, 335 S.E.2d 742 (1985).

Denial of double jeopardy claim without written order. — An appeal from the denial of a claim of former jeopardy regarding which there was no written order was subject to dismissal, since there was no entry of judgment. *Bishop v. State*, 176 Ga. App. 357, 335 S.E.2d 742 (1985).

State has a right to appeal the grant of a plea in bar based on double jeopardy. *State v.*

Stowe, 167 Ga. App. 65, 306 S.E.2d 663 (1983).

Denial of motion to dismiss based on speedy trial statute. — The denial of a motion to dismiss based upon § 17-7-170 is directly appealable under subsection (a). *Hubbard v. State*, 254 Ga. 694, 333 S.E.2d 827 (1985).

A criminal defendant is not required to follow the interlocutory procedures of subsection (b) when appealing, prior to the conclusion of a trial on the merits, from the denial of a plea in bar based on § 17-7-170. *Hubbard v. State*, 254 Ga. 694, 333 S.E.2d 827 (1985).

Complaint terminated by grant of motion for summary judgment. — Where the plaintiff's complaint for an order setting aside or modifying the investigative demand under subsection (c) of § 10-1-403 has been terminated by the grant of the motion for summary judgment of Administrator of the Office of Consumer Affairs, the judgment upon this statutory complaint is final and therefore is appealable. *Tri-State Bldg. & Supply, Inc. v. Reid*, 251 Ga. 38, 302 S.E.2d 566 (1983).

The trial court's denial of the defendant's motion to dismiss the plaintiff's appeal, following a grant of summary judgment to the defendant, was not interlocutory but was directly appealable. *ITT Terryphone Corp. v. Modems Plus, Inc.*, 171 Ga. App. 710, 320 S.E.2d 784 (1984).

Order finding children deprived. — Where the juvenile court entered an order finding certain children deprived, but made no final disposition with regard to the custody of the children, no final order has been entered in the case, there is nothing for the Court of Appeals to review, and the appeal must be dismissed. *In re M.K.C.*, 166 Ga. App. 261, 304 S.E.2d 430 (1983).

Judgment granting plea of insanity. — Where a plea of insanity was granted and defendant was transferred to the Department of Human Resources (DHR), the DHR could appeal directly without following the interlocutory appeal procedure. *Georgia Dep't of Human Resources v. Drust*, 264 Ga. 514, 448 S.E.2d 364 (1994).

Fieri facias is not an order of final judgment tolling the time for appeal. *Newton v. K.B. Property Mgt. of Ga., Inc.*, 166 Ga. App. 901, 306 S.E.2d 5 (1983).

Superior court order remanding a case back to the administrative tribunal does not constitute a final judgment. *State Health Planning Review Bd. v. Piedmont Hosp.*, 173 Ga. App. 450, 326 S.E.2d 814 (1985).

Order declaring that defendants had not defaulted with respect to a settlement agreement and ordering the parties to comply with the terms of the agreement did not constitute a final judgment, where the order did not expressly provide either that the action was dismissed or that plaintiffs receive judgment in accordance with the terms of the agreement. *Zeitman v. McBrayer*, 201 Ga. App. 767, 412 S.E.2d 287 (1991).

Imposition of first-offender status. — The Court of Appeals lacks jurisdiction to entertain an appeal from a conviction upon imposition of first-offender status absent a written trial court order imposing first offender status upon the defendant or a written judgment of conviction and sentence. *Littlejohn v. State*, 185 Ga. App. 31, 363 S.E.2d 327 (1987).

Request for clarification. — Trial court order expressing uncertainty as to the meaning of an appellate court's opinion in remanding a case was not a directly appealable final judgment, since it did not address a pending motion for judgment but only constituted a request by the trial court for clarification. *Nationwide Mut. Ins. Co. v. Glaccum*, 200 Ga. App. 108, 407 S.E.2d 90 (1991).

Trial court's order remanding case for hearing before the county board of equalization to allow the taxpayer to participate at the hearing regarding a property assessment was not a "final judgment," and required an application for interlocutory review. *Rolleston v. Glynn County Bd. of Tax Assessors*, 213 Ga. App. 552, 445 S.E.2d 345 (1994).

Rulings Not Appealable Without Certificate

1. In General

Order denying motion to suppress evidence is not a final judgment within subsection (a) of this section. *Cody v. State*, 116 Ga. App. 331, 157 S.E.2d 496 (1967); *Holton v. State*, 173 Ga. App. 249, 326 S.E.2d 240 (1985).

Denial of motion for change of venue is not a final judgment and there is no provi-

Rulings Not Appealable Without**Certificate (Cont'd)****1. In General (Cont'd)**

sion in this article for appeal therefrom without certificate of immediate review. *Brooks v. State*, 229 Ga. 593, 194 S.E.2d 256 (1972).

An order transferring a case from one county's superior court to another county's superior court is not a final judgment because the case is still pending in the court below. The order is thus interlocutory and not appealable without a certificate of immediate review from the lower court and an appropriate application to the Court of Appeals. *Griffith v. Georgia Bd. of Dentistry*, 175 Ga. App. 533, 333 S.E.2d 647 (1985).

Grant of motion to set aside judgment, like grant of motion for new trial, leaves case still pending in court and thus is not a final judgment. *Mayson v. Malone*, 122 Ga. App. 814, 178 S.E.2d 806 (1970).

Orders regarding garnishment judgments.

— Neither order overruling, nor order granting motion to set aside judgment against garnishee is final. *Finch v. Kilgore*, 120 Ga. App. 320, 170 S.E.2d 304 (1969).

Order denying motion to require that garnishment bond be strengthened is not a final judgment from which appeal will lie under subsection (a) of this section, and a review of order can be had only under certificate of trial judge as is provided in subsection (b) of this section. *Wilson v. Wilson*, 130 Ga. App. 175, 202 S.E.2d 681 (1973).

Order vacating prior order substituting parties is not a final judgment since it merely leaves issues therein involved open for further determination. Thus, absent certificate of immediate review question will not be considered by court. *Franklin v. Sea Island Bank*, 120 Ga. App. 654, 171 S.E.2d 866 (1969).

Order granting writ of possession is not final within meaning of subsection (a) of this section. *Golden v. Gray*, 156 Ga. App. 596, 275 S.E.2d 162 (1980).

Directed verdict or order sustaining motion for directed verdict is not appealable under this section as judgment and not verdict is the appealable decision. *Roderiguez v. Newby*, 130 Ga. App. 139, 202 S.E.2d 565 (1973).

Order overruling motion relating to temporary alimony. — Appeal from order over-

ruling husband's motion to declare as null and void any further proceedings in matter relating to temporary alimony and child custody is not one which may be appealed to Supreme Court or Court of Appeals without certificate for immediate review. *Hatcher v. Hatcher*, 229 Ga. 252, 190 S.E.2d 535 (1972).

Order dismissing party. — Where there has been no express determination of no just reason for delay or direction that order for entry of judgment is final, providing for immediate appeal, or issuance of certificate as provided for by subsection (b) of this section, appeal is premature. Dismissal of a party is no different from order precluding intervenor from becoming a party. *American Mut. Liab. Ins. Co. v. Moore*, 120 Ga. App. 624, 171 S.E.2d 751 (1969).

Unless court in order dismissing one of multiple defendants makes express determination of finality as set out in § 9-11-54(b), case is still pending in trial court and procedure for interlocutory appeals must be followed. *Home Mart Bldg. Centers, Inc. v. Wallace*, 139 Ga. App. 49, 228 S.E.2d 22 (1976).

An order granting one co-defendant's motion to dismiss and an order denying plaintiff's motion to vacate the order of dismissal were not appealable as final orders because the case remained pending against the other co-defendants. *Knowles v. Old Spartan Life Ins. Co.*, 213 Ga. App. 204, 444 S.E.2d 136 (1994).

Overruling special demurrer. — Objections to overruling a special demurrer are reviewable by the appellate courts under the interlocutory appeal procedures of subsection (b), or after conviction. *Ivey v. State*, 210 Ga. App. 782, 437 S.E.2d 810 (1993).

Where ex contractu and ex delicto actions are joined, dismissal of one leaves other pending. — Where ex contractu and ex delicto actions are joined in same complaint, but ex delicto count is dismissed by trial judge, ex contractu count still remains; therefore cause is still pending in court below, and appeal would be premature. *Stephens v. United Trust Life Ins. Co.*, 118 Ga. App. 514, 164 S.E.2d 335 (1968).

Order sustaining or overruling objections to interrogatories. — While orders denying or requiring answers to interrogatories are reviewable on appeal after final judgment if they have affected final judgment and are

not moot, an order sustaining or overruling objections to interrogatories is merely interlocutory and not being a final judgment such order is not an appealable judgment under this section. *Louisville & N.R.R. v. Clark*, 114 Ga. App. 755, 152 S.E.2d 694 (1966).

Order for interrogatories or depositions is an interlocutory order. *General Recording Corp. v. Chadwick*, 136 Ga. App. 213, 220 S.E.2d 697 (1975).

An order compelling a party to answer interrogatories and requests to produce, with sanctions, is not subject to direct appeal and requires a certificate of immediate review. *American Express Co. v. Yondorf*, 169 Ga. App. 498, 313 S.E.2d 756 (1984).

Judgment denying intervention is not an appealable judgment and a motion to dismiss appeal must be granted. *Henderson v. Atlanta Transit Sys.*, 233 Ga. 82, 210 S.E.2d 4 (1974).

Appeal which merely challenges party's right to intervene in action falls within subsection (b) of this section which allows appeal from order, decision or judgment not otherwise subject to direct appeal only when trial judge certifies it for immediate review. *Harrison v. Hawkins*, 228 Ga. 522, 186 S.E.2d 779 (1972).

Judgment sustaining or dismissing plea in abatement is not such a final judgment as can be made subject of appeal within meaning of section. *Peach v. State*, 116 Ga. App. 703, 158 S.E.2d 701 (1967).

Ruling on plea of abatement on ground that similar suit between same parties is pending. — Sustaining or overruling of plea in abatement on ground that there is another suit pending between same parties on same cause of action is not a final judgment from which appeal can be taken. *Richard's Buick, Inc. v. Sease*, 116 Ga. App. 232, 156 S.E.2d 365, *aff'd*, 223 Ga. 754, 158 S.E.2d 402 (1967).

Judgment overruling plea to jurisdiction is not included in those named in this section, from which appeal may be taken. *Carlisle v. Carlisle*, 227 Ga. 221, 179 S.E.2d 769 (1971).

Judgment denying plea of insanity is not subject to direct appeal unless trial judge certifies judgment for immediate review. *Spell v. State*, 120 Ga. App. 398, 170 S.E.2d 701 (1969); *Spell v. State*, 225 Ga. 705, 171 S.E.2d 285 (1969).

Order of court overruling and dismissing plea of *res judicata* is not such an order, judgment or ruling from which an appeal may be taken, without trial judge certifying matter to be of such importance that immediate review should be had. *General Shoe Corp. v. Hood*, 119 Ga. App. 648, 168 S.E.2d 326 (1969).

Overruling of defendant's plea in bar which leaves case pending for trial is not a final judgment from which appeal can be taken, absent certificate for immediate review. *Bruce v. State*, 122 Ga. App. 159, 176 S.E.2d 515 (1970); *Partain v. State*, 138 Ga. App. 171, 225 S.E.2d 736 (1976).

Denial of motion for judgment notwithstanding mistrial is not a judgment or decision from which appeal may be taken without first obtaining certificate for immediate review from trial judge. *Phillips v. State*, 153 Ga. App. 410, 265 S.E.2d 293 (1980).

Denial of prayers of traverse. — Where trial court denies prayers of traverse and defendant attempts to appeal this order, but fails to obtain certificate of review as required by subsection (b) of this section, appeal shall be dismissed. *Southern Cross Dist. Co. v. W.R. Bean & Son*, 123 Ga. App. 363, 180 S.E.2d 926 (1971).

Failure of court to declare Act of legislature unconstitutional is not a final judgment and, therefore, in absence of certificate of trial court, is not appealable. *Lane v. Morrison*, 226 Ga. 526, 175 S.E.2d 830 (1970).

Orders subject to revision. — Where orders are subject to revision, appeals are premature. *Davis v. Transairco, Inc.*, 141 Ga. App. 544, 234 S.E.2d 134 (1977).

Grant of relief from supersedeas of permanent injunction is not an appealable judgment. *Fulford v. Fulford*, 225 Ga. 510, 170 S.E.2d 27 (1969).

Order entered following delinquency adjudicatory hearing under § 15-11-15 is not a final judgment appealable under this section, but is instead merely an order entered in a pretrial hearing similar to an arraignment. *D.C.E. v. State*, 130 Ga. App. 724, 204 S.E.2d 481 (1974).

Appeal from deprivation hearing rulings absent entry of final written order. — Where the appellant brought a direct appeal from the juvenile court's rulings on the issues of appellant's delinquency and a transfer for

Rulings Not Appealable Without Certificate (Cont'd)

1. In General (Cont'd)

his prosecution in the superior court made in the context of a deprivation hearing, and the record showed that no final written order as to appellant's deprivation had ever been entered, the deprivation case is still pending in the juvenile court so that any rulings made in that case are interlocutory and, accordingly, appellant's appeal was dismissed for lack of jurisdiction. *In re J.B.*, 191 Ga. App. 797, 383 S.E.2d 184 (1989).

Divorce granted on pleadings by order leaving other issues for decision in trial court, is an interlocutory, not a final, order. *Carr v. Carr*, 238 Ga. 197, 232 S.E.2d 69 (1977).

Entry of judgment as to one or more but fewer than all claims or parties is not a final judgment under subsection (a) of this section and lacks res judicata effect unless trial court makes express direction for entry of final judgment and determination that no just reason for delaying finality of judgment exists. *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 248 S.E.2d 641 (1978); *Wise v. Georgia State Bd. for Examination, Qualification & Registration of Architects*, 244 Ga. 449, 260 S.E.2d 477 (1979); *Gresham Park Community Org. v. Howell*, 652 F.2d 1227 (5th Cir. 1981).

In absence of express determination by court that there is no just reason for delay and express direction for entry of judgment, no order or decision which adjudicates with respect to fewer than all claims or all parties is final or appealable. *Roderiguez v. Newby*, 130 Ga. App. 139, 202 S.E.2d 565 (1973).

Where there is a case involving multiple parties or multiple claims, a decision adjudicating fewer than all the claims or the rights and liabilities of less than all the parties is not a final judgment. In such circumstances, there must be an express determination under § 9-11-54(b) (judgments), or there must be compliance with the requirements of subsection (b) of this section. Where neither of these sections are followed, an appeal is premature and must be dismissed. *Spivey v. Rogers*, 167 Ga. App. 729, 307 S.E.2d 677 (1983); *Johnson v. Hospital Corp. of Am.*, 192 Ga. App. 628, 385 S.E.2d 731, cert. denied, 192 Ga. App. 902, 385 S.E.2d

731 (1989); *King v. Bishop*, 198 Ga. App. 622, 402 S.E.2d 307, cert. denied, 198 Ga. App. 898, 402 S.E.2d 307 (1991).

Because an order transferring venue entered judgment as to fewer than all of the claims or parties in the action, it was not a final judgment under paragraph (a)(1), and as a result, in order for an appeal to be possible, it would have been necessary for the plaintiffs to request certification from the trial judge, within ten days of entry of the order, that it was of such importance to the case that immediate review should be had. *Jenkins v. National Union Fire Ins. Co.*, 650 F. Supp. 609 (N.D. Ga. 1986).

Judgment against defendant with right in plaintiff to present evidence as to unliquidated damages, leaves case pending, and appeal is premature. *Black v. Sturdivant*, 131 Ga. App. 698, 206 S.E.2d 526 (1974).

Judgment of condemnation not final while appeal to jury as to value is pending. — Where appeal to jury as to value is pending, judgment of condemnation under special master's condemnation procedure is not a final judgment subject to review in absence of certificate as provided for by subsection (b) of this section. *City of Atlanta v. Turner Adv. Co.*, 234 Ga. 1, 214 S.E.2d 501 (1975).

Ruling on motion to purge jury is interlocutory and outside definition of those judgments or orders listed in this section which entitle party to an appeal. *Ruth v. Kennedy*, 117 Ga. App. 632, 161 S.E.2d 410 (1968).

Where trial of suit results in mistrial, there is no final judgment in case. *Selman's Express, Inc. v. Wright*, 119 Ga. App. 752, 168 S.E.2d 658 (1969).

A verdict is not an appealable decision or judgment within purview of section. *Williams v. Keebler*, 222 Ga. 437, 150 S.E.2d 674, answer conformed to, 114 Ga. App. 332, 151 S.E.2d 483 (1966); *Teppenpaw v. Blalock*, 121 Ga. App. 320, 173 S.E.2d 442, aff'd, 226 Ga. 619, 176 S.E.2d 711 (1970).

Where there is only an appeal from a jury verdict, and no description of an appealable judgment or order, there is nothing to review, and Court of Appeals has no jurisdiction since it is a court for corrections of errors of law alone. *Interstate Fire Ins. Co. v. Chattam*, 222 Ga. 436, 150 S.E.2d 618, answer conformed to, 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Verdict of jury is not an appealable judg-

ment under section, regardless of whether verdict resulted from direction or was by deliberation. *Hurst v. Starr*, 226 Ga. 42, 172 S.E.2d 604 (1970).

Appeal from judgment on verdict brought while motion for new trial is pending is premature and will be dismissed. *Smith v. Smith*, 128 Ga. App. 29, 195 S.E.2d 269 (1973).

Case remains pending where no ruling on motions, defenses and counterclaims. — Where appellant has filed motions, defenses and counterclaims pursuant to §§ 44-14-267 and 44-14-268 and no ruling by trial judge has been made thereon, such issues have not been finally determined and case is still pending in court below. *Golden v. Gray*, 156 Ga. App. 596, 275 S.E.2d 162 (1980).

Letter from an official within the office of the commissioner of the department of revenue was not an agency "decision" within the meaning of subsection (a)(1). *Ford Motor Co. v. Collins*, 257 Ga. 310, 357 S.E.2d 567 (1987).

Allegations of fraud. — Where there are no allegations of fraud in the complaint subsection (a)(5) does not apply. *Thomas v. Barnett Bank*, 203 Ga. App. 472, 416 S.E.2d 902 (1992).

Determination of liability without determination of damages. — There having been no compliance with interlocutory appeal procedures of subsection (b), a judgment is not final, and hence not appealable, either with respect to the codefendant's case or with respect to the case as a whole where the underlying issue of liability has been determined against only the codefendant, but the determination of damages is unsettled. *Havischak v. Neal*, 176 Ga. App. 203, 335 S.E.2d 469 (1985).

Order to pay past due rent. — In dispossession proceeding, order requiring appellant to pay to appellee certain past due rent was not a final judgment where, although trial court indicated that if stipulated sums were not paid a writ of possession would be issued, the record did not reveal actual entry of a writ of possession. *Rivera v. Housing Auth.*, 163 Ga. App. 648, 295 S.E.2d 336 (1982), cert. denied, 250 Ga. 461, 299 S.E.2d 39 (1983).

Trial court denial of defendant's demurrer making constitutional challenge to the method of notification used by the Depart-

ment of Public Safety in revoking a driver's license will not be reviewed where the defendant fails to make an application for interlocutory appeal. *Webster v. State*, 251 Ga. 465, 306 S.E.2d 916 (1983).

Denial of a motion for pretrial bail is an interlocutory matter requiring a defendant to follow the interlocutory procedure set forth in subsection (b). *Howard v. State*, 194 Ga. App. 857, 392 S.E.2d 562 (1990).

Order denying discovery is premature in the absence of a certificate of immediate review; therefore, the interlocutory appeal procedure set forth in subsection (b) is mandated. *Rogers v. Department of Human Resources*, 195 Ga. App. 118, 392 S.E.2d 713 (1990); *Hayes v. State*, 207 Ga. App. 520, 428 S.E.2d 425 (1993).

Order denying motion for reconsideration is interlocutory order that, just as any other interlocutory order, can be the subject of an application for interlocutory appeal if a certificate of immediate review is obtained from the trial court. *Mayor of City of Savannah v. Norman J. Bass Constr. Co.*, 264 Ga. 16, 441 S.E.2d 63 (1994).

Orders on the basis of qualified immunity. — Except in clear cases, trial courts should issue a certificate of immediate review under subsection (b) for interlocutory orders denying dismissal or judgment on the basis of qualified immunity. *Turner v. Giles*, 264 Ga. 812, 450 S.E.2d 421 (1994).

2. Motions to Dismiss

Judgments overruling motions to dismiss and motions for judgment on pleadings are not final or appealable judgments without certificate for immediate review, and such certificate must be obtained within ten-day period from entry of judgment or judgments sought to be appealed. *Turner v. Harper*, 231 Ga. 175, 200 S.E.2d 748 (1973).

Motion to dismiss accusation was not a final judgment from which appeal could be taken, absent a certificate of immediate review. — Where defendant was charged with abandoning his two minor children and filed a motion to dismiss the accusation, asserting general grounds, the trial court properly denied the motion to dismiss, because defendant did not comply with the interlocutory appeal procedure prescribed by subsection (b) of this Code section; the overruling of defendant's motion to dismiss

Rulings Not Appealable Without Certificate (Cont'd)

2. Motions to Dismiss (Cont'd)

the accusation, leaving the case pending for trial, was not a final judgment from which appeal could be taken, absent a certificate of immediate review. *Boyd v. State*, 191 Ga. App. 435, 383 S.E.2d 906 (1989).

Overruling of motion to dismiss for failure to state claim leaves action pending in trial court for further proceedings and, therefore, is not appealable. *Padgett v. Cowart*, 232 Ga. 633, 208 S.E.2d 455 (1974).

In absence of certificate for immediate review, appeal, from orders of trial court overruling defendant's motion to dismiss for failure to state a claim and motion to dismiss complaint on pleadings, is premature and must be dismissed. *Osborne v. Welch*, 119 Ga. App. 853, 168 S.E.2d 897 (1969).

Denial of motion to dismiss as final appealable order. — In a declaratory judgment action, where the trial court entered an order denying a motion to dismiss the actions in effect granting partial summary judgment, a direct appeal could be taken from what appeared to be a final order addressing the issues raised in the petition for declaratory judgment. *Spivey v. Safeway Ins. Co.*, 210 Ga. App. 775, 437 S.E.2d 641 (1993).

Order denying motion to dismiss for lack of jurisdiction is an interlocutory order, which is not appealable without certificate of immediate review. *Davis v. Davis*, 242 Ga. 322, 249 S.E.2d 90 (1978).

Denial of motion to dismiss where case still pending. — Interlocutory appeal procedures must be followed to appeal from the denial of a motion to dismiss where the case is still pending below. *Pace Constr. Corp. v. Northpark Assocs.*, 215 Ga. App. 438, 450 S.E.2d 828 (1994).

Denial of motion to dismiss appointment of auditor. — Subsection (a) of this section makes no provision for appealing denial of motion to dismiss appointment of auditor. *Roberts v. Roberts*, 228 Ga. 293, 185 S.E.2d 376 (1971).

Judgment denying motion to reconsider order overruling motions to dismiss. — Judgment denying defendant's motion to reconsider a previous order of court overruling defendant's demurrers (now motions to

dismiss) to plaintiff's petition is not an appealable judgment. *LeCraw v. L.P.D., Inc.*, 114 Ga. App. 281, 150 S.E.2d 927 (1966).

Dismissal based on a motion not supported by evidence is not final and directly appealable unless, as a result, the case is no longer pending in the court below. *McGregor v. Stachel*, 200 Ga. App. 324, 408 S.E.2d 118 (1991).

Order sustaining motion to dismiss plea of nudum pactum. — Order sustaining general demurrer (now motion to dismiss) to defendant's plea of nudum pactum is not a final judgment and is therefore not appealable. *Parish v. Georgia R.R. Bank & Trust Co.*, 115 Ga. App. 540, 154 S.E.2d 750 (1967).

Order granting motion to dismiss prayer of petition. — Where demurrer (now motion to dismiss) to one of the prayers of petition is sustained and prayer is ordered deleted from petition and petition redrawn, such order is not a final judgment or such other ruling, judgment, or order as will support an appeal. *Strickland v. English*, 114 Ga. App. 731, 152 S.E.2d 705 (1966).

Judgment sustaining motion to dismiss and allowing time to amend. — While judgment sustaining general demurrer (now motion to dismiss) operates as a dismissal in absence of provision allowing time in which to amend, such dismissal, where time to amend is allowed, does not become effective until time for amendment has elapsed, and appeal prior thereto is premature. *Black v. Miller*, 113 Ga. App. 10, 147 S.E.2d 57, later appeal, 114 Ga. App. 208, 150 S.E.2d 466 (1966).

Orders dismissing defendant's third-party complaint and denying motion to add third-party defendant as party defendant are neither final nor appealable without certificate for immediate review. *Von Waldner v. Baldwin/Cheshire, Inc.*, 133 Ga. App. 23, 209 S.E.2d 715 (1974).

Appealability of dismissal as to some defendants. — Where several defendants are sued jointly on joint cause of action, and there is a final dismissal as to some of them, judgment of dismissal cannot be reviewed until final termination of action; but where several defendants are sued jointly, but not on a joint cause of action, judgment of dismissal is such a final judgment as can be reviewed immediately. *Sanders v. Culpepper*, 226 Ga. 598, 176 S.E.2d 83 (1970).

Appeal from order dismissing or striking party to joint action will lie, without obtaining a certificate of appealability from trial judge, where cause of action is either several or joint and several. *Robinson v. Bomar*, 122 Ga. App. 564, 177 S.E.2d 815 (1970), overruled on other grounds, *Leggett v. Benton Bros. Drayage & Storage Co.*, 138 Ga. App. 761, 227 S.E.2d 397 (1976).

Appeal from order dismissing claim is premature when counterclaim is pending in court below. *Cleveland v. Watkins*, 159 Ga. App. 885, 285 S.E.2d 546 (1981).

Dismissal of uninsured motorist coverage carrier. — An order dismissing an action against a driver's uninsured motorist insurance carrier for failure to serve the carrier within the two-year statute of limitations was not directly appealable, where the claim against the alleged tortfeasor remained pending and the trial court had not certified the order as final. *Carlisle v. Travelers Ins. Co.*, 195 Ga. App. 21, 392 S.E.2d 344 (1990).

3. Motions Regarding Default Judgments

Order allowing motion to open default. — Appeal from order allowing a motion to open default where no certificate of review under subsection (b) of this section is filed is premature and must be dismissed. *North Ga. Hous., Inc. v. Pressley*, 123 Ga. App. 273, 180 S.E.2d 607 (1971).

Where default judgment is vacated and set aside, jurisdiction remains in trial court and judgment is neither final within meaning of subsection (a), nor directly appealable. Absent certificate of immediate review, as provided by subsection (b), appeal is premature and must be dismissed. *Notrica v. Southern Bell Tel. & Tel. Co.*, 147 Ga. App. 737, 250 S.E.2d 196 (1978).

Order vacating and setting aside default judgment which has effect of continuing pendency of case in trial court, judgment was not final. *First Nat'l Bank v. Hudson*, 139 Ga. App. 629, 229 S.E.2d 109 (1976).

Appeal from grant of motion to set aside judgment and open default, leaving case pending below is premature and should be dismissed if there is no certificate for immediate review from trial judge nor petition to appellate court for allowance of appeal. *Thigpen v. Futura Constr., Inc.*, 140 Ga. App. 65, 230 S.E.2d 92 (1976).

Order vacating and setting aside default judgment and allowing defendant to file defensive pleadings leaves case still pending in court below, and in absence of certificate of immediate review appeal is premature and subject to being dismissed. *Lee v. Smith*, 119 Ga. App. 808, 168 S.E.2d 880 (1969).

Judgment granting motion to set aside default judgment entered against garnishee is not a final judgment. *Davis v. Davis*, 139 Ga. App. 599, 229 S.E.2d 81 (1976).

Default opened as of right by filing defenses within 15 days is not final. — Default which is opened as a matter of right by filing of defenses within 15 days of day of default upon payment of costs is not a final judgment and case is still pending in trial court if no certificate for immediate review is signed or entered within ten days of order complained of. *Shuford v. Jackson*, 139 Ga. App. 469, 228 S.E.2d 605 (1976).

4. Rulings Concerning Counterclaims and Cross Actions

Dismissal of counterclaim is not a final order. *Lowe v. Payne*, 130 Ga. App. 337, 203 S.E.2d 309 (1973).

Dismissal of counterclaim is not such judgment as leaves cause no longer pending in trial court. Absent certificate of immediate review, appeal is premature. *Register v. Kandlbinder*, 132 Ga. App. 435, 208 S.E.2d 565 (1974).

Order dismissing an insured's counterclaim for personal injury protection benefits was neither a final judgment nor otherwise directly appealable, where the dismissal was not intended to constitute a ruling on the merits of the counterclaim, although the ruling was characterized as a dismissal for failure to state a claim. *Denney v. Shield Ins. Co.*, 183 Ga. App. 280, 358 S.E.2d 628, cert. denied, 183 Ga. App. 905, 358 S.E.2d 628 (1987).

Dismissal of counterclaim while case remains pending. — As appeal from order dismissing counterclaim is not a final judgment because case remains pending in trial court, such appeal is premature and must be dismissed in absence of requisite immediate review certificate. *Kilgore v. Kennesaw Fin. Co.*, 128 Ga. App. 120, 195 S.E.2d 799 (1973).

Ruling sustaining motion to dismiss various counts of counterclaim is not final. *Huff*

Rulings Not Appealable Without Certificate (Cont'd)

4. Rulings Concerning Counterclaims and Cross Actions (Cont'd)

v. Rogers, 129 Ga. App. 897, 202 S.E.2d 243 (1973).

Judgment rendered while defendant's counterclaim remains pending. — Judgment is not final if case is still pending in lower court in form of defendant's counterclaim. *Conte Enterprises, Inc. v. Romax Constr. Co.*, 128 Ga. App. 121, 195 S.E.2d 798 (1973).

Pendency of counterclaim plus absence of determination by the trial judge that there is no just reason for delay and express direction for entry of judgment under § 9-11-54 prevents order from being final and appealable. This, coupled with failure to follow the applicable procedure for review under this section, subjects the appeal to dismissal. *Cleveland v. Watkins*, 159 Ga. App. 885, 285 S.E.2d 546 (1981).

Where defendant's counterclaim is still pending in trial court, order of that court dismissing main complaint against such defendant is not appealable, absent proper certification from trial judge, accompanied by application for immediate review. *Wrip, Inc. v. Sledger*, 162 Ga. App. 727, 292 S.E.2d 871 (1982).

Order dismissing claim while counterclaim or cross action remains pending. — Where there is no express determination that there is no just reason for delay nor an express direction for entry of judgment under § 9-11-54(b), nor is there a certificate for immediate review under subsection (b) of this section, appeal from order dismissing plaintiff's claim is premature when there is a counterclaim pending in court below. *Campbell v. George*, 129 Ga. App. 644, 200 S.E.2d 503 (1973).

Where answer of defendant contains prayer for affirmative legal relief germane to plaintiff's suit, dismissal of plaintiff's suit on general demurrer (now motion to dismiss) does not carry with it defendant's cross action (now counterclaim), so cross action is still pending and there is no final judgment within contemplation of Appellate Practice Act. *Brown v. Elliott*, 115 Ga. App. 89, 153 S.E.2d 665 (1967).

Where plaintiff's suit is dismissed, but

defendant's cross action (now counterclaim) seeking money judgment against plaintiff is still pending, appeal by plaintiff must be dismissed. *O'Kelley v. Evans*, 223 Ga. 512, 156 S.E.2d 450 (1967).

Where defendant's counterclaims against plaintiff are still pending in trial court, judgment dismissing plaintiff's complaint is not such a final judgment as may be directly appealed under this section. *Farmers Coop. Ins. Co. v. Hicks*, 227 Ga. 755, 182 S.E.2d 895 (1971).

Order of court overruling plaintiff's oral motion to dismiss defendant's cross action (now counterclaim) is not a final judgment. *Birdwell v. Pippen*, 113 Ga. App. 202, 147 S.E.2d 673 (1966).

Order striking answer and cross action (now counterclaim) of defendants and refusing to open default. — In action seeking property damages resulting from automobile collision, order striking answer and cross action of defendants and refusing to open default is not an order which can be directly appealed from under this section without certification of trial judge. *Melton v. Grider*, 119 Ga. App. 376, 166 S.E.2d 915 (1969).

Order striking answer and cross action (now counterclaim) as barred by statute of limitations leaves case pending. — Order of trial judge sustaining plaintiff's oral motion to strike amended answer and cross action as barred by statute of limitations, leaves case pending in court below and is not a final judgment from which appeal will lie. *Hood v. Akins*, 114 Ga. App. 733, 152 S.E.2d 704 (1966).

Striking of counterclaim after consideration of proposed pretrial orders of plaintiff and defendant, pleadings, evidence and arguments of counsel is tantamount to grant of summary judgment motion and appealable without certificate of immediate review even though interlocutory. *Aiken v. Citizens & S. Bank*, 249 Ga. 481, 291 S.E.2d 717, cert. denied, 459 U.S. 973, 103 S. Ct. 307, 74 L. Ed. 2d 287 (1982).

Summary Judgments

1. Grants

Grant of summary judgment is an exception to rule requiring final judgment in order to appeal. *Whisenhunt v. Allen Parker*

Co., 119 Ga. App. 813, 168 S.E.2d 827 (1969).

One may appeal grant of summary judgment on any issue or as to any party. *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969).

Grant of co-defendant's motion. — Only if co-defendants are sued as joint tort-feasors does the grant of summary judgment as to one potentially affect the other's rights of contribution. Therefore, it is only in this situation that the co-defendant would be deemed a losing party and have standing to appeal the grant of summary judgment to another co-defendant. *C.W. Mathews Contracting Co. v. Studard*, 201 Ga. App. 741, 412 S.E.2d 539 (1991).

Party may appeal grant of summary judgment after rendition of final judgment in case, and summary judgment is not res judicata as to any other claims which remained pending. *Ramseur v. American Mgt. Ass'n*, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

Effect of granting appellee's motion on appellant's motion for same. — Grant of appellee's motion for summary judgment disposed of entire case in court below, and had effect of making appellant's denial of summary judgment a final judgment, directly appealable. *Stallings v. Chance*, 239 Ga. 567, 238 S.E.2d 327 (1977).

In action where cross motions for summary judgments are made, grant of one party's motion disposes of entire case in trial court, and no issue is left pending for decision. This has effect of making opposing party's denial of summary judgment a final judgment and directly appealable under subsection (a). *Baker v. NEI Corp.*, 144 Ga. App. 165, 241 S.E.2d 4 (1977).

Grant of motion for summary judgment in the Civil Court of Bibb County can be appealed directly to the Court of Appeals. *Middle Ga. Bank v. Continental Real Estate & Assocs.*, 168 Ga. App. 611, 309 S.E.2d 893 (1983).

2. Denials

Overruling of motion for summary judgment may be reviewed only upon direct appeal from that judgment. *Hood v. General Shoe Corp.*, 119 Ga. App. 649, 168 S.E.2d 326 (1969).

Appealability of denial of summary judgment. — Party against whom summary judgment is granted may appeal either after grant of summary judgment or after rendition of final judgment. *Surgent v. Surgent*, 153 Ga. App. 100, 264 S.E.2d 568 (1980).

Compliance with requirements of section. — Denial of motion for summary judgment not reviewable by direct appeal except as provided in section. *Carroll v. Campbell*, 226 Ga. 700, 177 S.E.2d 83 (1970); *Belt v. Allstate Ins. Co.*, 140 Ga. App. 740, 231 S.E.2d 831 (1976); *Johnston-Willis Hosp. v. Cain*, 142 Ga. App. 305, 236 S.E.2d 374 (1977); *Garrett v. Heisler*, 149 Ga. App. 240, 253 S.E.2d 863 (1979).

There is no provision for review of denial of summary judgment except by direct appeal with certificate of trial judge and application for review to appropriate appellate court as provided by this section. *Marietta Yamaha, Inc. v. Thomas*, 237 Ga. 840, 229 S.E.2d 753 (1976); *American Mut. Fire Ins. Co. v. Llewellyn*, 142 Ga. App. 824, 237 S.E.2d 227 (1977).

Denial of motion for summary judgment is not reviewable by appellate courts in absence of timely certificate of immediate review or granting of interlocutory appeal by appellate court unless there is final judgment in case and cause is no longer pending in lower court. *Barlow v. Yenkosky*, 146 Ga. App. 872, 247 S.E.2d 519 (1978); *Weldon v. Southeastern Fid. Ins. Co.*, 157 Ga. App. 698, 278 S.E.2d 500 (1981); *Sharpe's Appliance Store, Inc. v. Anderson*, 161 Ga. App. 112, 289 S.E.2d 312 (1982).

Ordinarily, a denial of a motion for partial summary judgment would be appealable only if an application for interlocutory review were granted after the trial court certified the matter for immediate review. *E.H. Crump Co. v. Miller*, 200 Ga. App. 598, 409 S.E.2d 235, cert. denied, 200 Ga. App. 896, 409 S.E.2d 235 (1991).

Where order denying appellants' motion for summary judgment is certified by trial court, but no application is made in accordance with subsection (b), appeal must be dismissed. *Century Bldrs., Inc. v. Carter*, 243 Ga. 14, 252 S.E.2d 507 (1979).

Denial of a motion for summary judgment must be appealed in accordance with the interlocutory appeal provisions of subsection (b). *Pace Constr. Corp. v. Northpark*

Summary Judgments (Cont'd)**2. Denials (Cont'd)**

Assocs., 215 Ga. App. 438, 450 S.E.2d 828 (1994).

Subsection (b) does not provide exclusive means of appealing denial. — When summary judgment is denied, it may be appealed after certification by trial judge and granting of application by appropriate appellate court; but this is not the exclusive means of appealing denial of motion for summary judgment. *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980).

Appealing denial of summary judgment where there is final judgment. — The law now permits review of denial of summary judgment without necessity of making application for interlocutory appeal where there is a final judgment — such as grant of motion for summary judgment. *Mahler v. Paquin*, 143 Ga. App. 773, 240 S.E.2d 185 (1977).

Denial of motion for summary judgment can be appealed without application when it is tied to appeal of an appealable order or judgment. *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980).

Denial of summary judgment may be tied to appeal from grant of summary judgment by opposite party. *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980).

When direct appeal is taken from grant of summary judgment, appellee may cross-appeal the denial of its motion for summary judgment. *Hall v. Richardson Homes, Inc.*, 168 Ga. App. 593, 309 S.E.2d 825 (1983).

Premature appeal. — Where the defendant obtained a certificate for immediate review from the trial judge within ten days of the denial of his motion for summary judgment in accordance with this section, but failed to apply to and obtain an order from the Court of Appeals granting an appeal, his appeal is premature. *Hargraves v. Turner*, 160 Ga. App. 807, 287 S.E.2d 664 (1982).

Judgments on Motions for New Trial**1. Grants**

Not appealable without certificate of review. — Where judgment appealed from is one granting motion for new trial, and there is no certificate of trial judge as required by

section, appeal must be dismissed. *Stewart v. Church*, 119 Ga. App. 58, 166 S.E.2d 436 (1969).

Judgment granting new trial is not a final judgment, and because it is not a final judgment, an interlocutory appeal cannot be prosecuted unless the trial judge grants a certificate for immediate review. *Henderson v. Henderson*, 231 Ga. 208, 200 S.E.2d 867 (1973).

Where no certificate of immediate review was obtained from trial court nor application made to Court of Appeals for interlocutory review, appeal from grant of extraordinary motion for new trial on special grounds was premature. *Moore v. Williams*, 163 Ga. App. 595, 295 S.E.2d 866 (1982).

The grant of a motion for new trial is not a final order from which a direct appeal may be taken, and if appellant did not comply with the interlocutory appeal provisions of subsection (b), the appeal must be dismissed for lack of jurisdiction. *Murray v. Rozier*, 186 Ga. App. 184, 367 S.E.2d 886 (1988).

The grant of a motion for new trial is not a final judgment within the meaning of paragraph (a)(1); therefore, an application for interlocutory review is required to be filed in order to give the Court of Appeals jurisdiction to entertain an appeal. *Rockdale Awning & Iron Co. v. Kerbow*, 210 Ga. App. 119, 435 S.E.2d 619 (1993).

Denial of interlocutory appeal does not prevent eventual review. — Denial of interlocutory appeal by statute does not prevent a litigant from eventually seeking review in appellate court of judgment granting new trial; this is so because upon conclusion of case in trial court and entry of final judgment, appeal can then be taken from final judgment, and in such appeal legality of judgment granting new trial can be attached. *Henderson v. Henderson*, 231 Ga. 208, 200 S.E.2d 867 (1973).

2. Denials

Judgment overruling motion for new trial is an appealable judgment. *Thornton v. State Hwy. Dep't*, 113 Ga. App. 351, 148 S.E.2d 66 (1966).

Judgment overruling motion for new trial based on appealable judgment is appealable. — Using liberal construction as required by § 5-6-30, it would be incongruous to declare unappealable a judgment overruling motion

for new trial which is based upon an admittedly appealable judgment. *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Judgment overruling motion for new trial is a final judgment since no subsequent judgment disposing of case is necessary. *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Denied motion final although rendered before judgment entered on verdict. — Order denying motion for new trial from general verdict is final and appealable, even though no judgment has been entered on verdict. This is so even though under federal practice an order granting or overruling motion for new trial is not a final judgment from which appeal may be taken. *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Order denying motion appealable although opposing party's motion for same remains pending. — Fact that one party's motion for new trial is still pending below does not deprive other party of right to independently press his motion to its proper conclusion and test it by appeal. *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Effect of suggested forms in § 5-6-51. — Forms contained in § 5-6-51 are merely suggested forms which are apparently intended for use in appeals from orders or judgments other than rulings on motions for new trial and do not, of themselves, make such rulings unappealable. The suggested forms of appeal are not exclusive. Their purpose is to have appeal show on its face the tolling of time for appeal when appeal is from original judgment. *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Injunctions and Restraining Orders

Interlocutory order. — Subsection (b) of this section changed the method by which an interlocutory order was appealed, providing not only for a certificate by the trial court but for application to and approval by the proper appellate court. *State v. Blossfield*, 165 Ga. App. 111, 299 S.E.2d 588 (1983).

A temporary injunction is appealable in absence of a certificate of immediate review. *Springtime, Inc. v. Douglas County*, 228 Ga. 753, 187 S.E.2d 874 (1972).

The grant of a temporary injunction is appealable. *Pizza Hut of Am., Inc. v. Kesler*, 254 Ga. 360, 329 S.E.2d 133 (1985).

Denial of motion to dismiss, accompanied by grant of permanent injunction. — If judgment does no more than deny motion to dismiss complaint, it, of course, is not an appealable judgment in absence of certificate of review, but where judgment does not stop there but goes on to award permanent injunction to plaintiffs, granting to them all relief which they seek in their complaint, judgment is final and subject to direct appeal under this section. *City of Jesup v. Bennett*, 226 Ga. 606, 176 S.E.2d 81 (1970).

Basis for appealability of permanent injunctions. — Although a permanent injunction is directly appealable, it is not so because it is a final order for appealability purposes, but because of a special statutory provision. *Gresham Park Community Org. v. Howell*, 652 F.2d 1227 (5th Cir. 1981).

Continuance of restraining order is appealable as an exception to doctrine of finality of judgments. *Spell v. Blalock*, 243 Ga. 459, 254 S.E.2d 842 (1979).

Judgment regarding dissolution of temporary restraining order must be on merits. — Issue of dissolution of temporary restraining order must have been heard and determined on its merits before judgment dissolving or refusing to dissolve it is subject to interlocutory appeal. *Clements v. Kushinka*, 233 Ga. 273, 210 S.E.2d 804 (1974).

Automatic dissolution of temporary restraining order is not an appealable judgment. *Clements v. Kushinka*, 233 Ga. 273, 210 S.E.2d 804 (1974).

Denial of ex parte temporary restraining order, is not a final judgment or one appealable under this section. *Williams v. Ware*, 240 Ga. 601, 242 S.E.2d 108 (1978).

Effect of pending jury trial on damages. — The denial of injunctive relief is immediately appealable under this section, even though there is a jury trial pending on the question of damages. *Earth Mgt., Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981).

Absent manifest abuse, trial court's discretion not interfered with. — The discretion of the trial court in granting or denying inter-

Injunctions and Restraining Orders (Cont'd)

locutory injunctive relief will not be interfered with in the absence of a showing of manifest abuse. *Mark Smith Constr. Co. v. Fulton County*, 248 Ga. 694, 285 S.E.2d 692 (1982).

Restraining order in divorce case. — Since the "underlying subject matter" of the case was divorce, case involving order temporarily restraining husband from selling, transferring or encumbering certain property was to be brought to the Supreme Court by application pursuant to § 5-6-35 rather than by direct appeal. *Rolleston v. Rolleston*, 249 Ga. 208, 289 S.E.2d 518 (1982).

Order denying motion for stay to conduct arbitration is not appealable except under interlocutory appeal provisions of this section. *Tasco Indus., Inc. v. Fibers & Fabrics*, 162 Ga. App. 593, 292 S.E.2d 439 (1982).

There is no direct appeal from order denying motion to stay proceedings pending arbitration. *Phillips Constr. Co. v. Cowart Iron Works, Inc.*, 162 Ga. App. 861, 293 S.E.2d 355 (1982), *aff'd*, 250 Ga. 488, 299 S.E.2d 538 (1983).

Stay pending arbitration. — Because of the unnecessary delay and expenses to parties of an incorrect determination of whether judicial proceedings should be stayed pending arbitration, trial courts, except in clearest cases, should certify orders granting or denying such stays for immediate appeal. *Phillips Constr. Co. v. Cowart Iron Works, Inc.*, 250 Ga. 488, 299 S.E.2d 538 (1983).

Grant or denial of a stay under the Soldiers' and Sailors' Civil Relief Act is a final judgment on the collateral matter of the stay and is directly appealable. *Vlasz v. Schweikhardt*, 178 Ga. App. 512, 343 S.E.2d 749 (1986).

Judgments of Contempt

Order adjudging one in contempt is a final judgment. — Order adjudging one in contempt means trial court has passed upon merits of cases and the order, in effect, is a final disposition of the contempt matter by that court, whether it involves an interlocutory order or a final judgment. *Ramsey v. Ramsey*, 231 Ga. 334, 201 S.E.2d 429 (1973).

When individual is adjudged in contempt, trial court is done with the matter and to require an application for discharge, as a condition precedent to appeal, is usually a futile and empty gesture. *Ramsey v. Ramsey*, 231 Ga. 334, 201 S.E.2d 429 (1973).

An order finding one in contempt of court is a subject for direct appeal. *In re Booker*, 186 Ga. App. 614, 367 S.E.2d 850 (1988).

Judgment rendered under court's own motion which authorizes holding persons named in contempt. — Judgment rendered *sua sponte* by superior court which mandates actions and which, if valid, would authorize court to hold persons named in such judgment in contempt of court is an appealable judgment. *Darden v. Ravan*, 232 Ga. 756, 208 S.E.2d 846 (1974).

Dismissal of one of two counts of cause of action does not permit case to be carried to appellate court while other count is left pending. *Georgia Cas. Co. v. McRitchie*, 42 Ga. App. 488, 156 S.E. 458 (1931).

Dismissal of crossbill on general demurrer (now motion to dismiss) is not a final disposition of cause under provisions of section. *Sanders v. Sanders*, 212 Ga. 244, 91 S.E.2d 604 (1956).

Judgment in contempt case is appealable without applying for discharge. — Use of conjunctive word "and" between categories of bail trover and contempt cases in paragraph (a)(2) suggests that it was intent of legislature to separate these two types of cases in statute so as to authorize appeal in contempt case without first requiring application for discharge. *Ramsey v. Ramsey*, 231 Ga. 334, 201 S.E.2d 429 (1973).

Order finding appellant in contempt but not imposing punishment is not final. — Where the trial court issues order finding appellant in contempt of court but does not impose punishment, no final judgment has been entered and case is still pending in court below and appellate court cannot review lower court's decision. *In re Crudup*, 149 Ga. App. 214, 253 S.E.2d 802 (1979).

Order to produce documents or face contempt not final order. — Where the trial court orders the defendant to permit subpoenaed documents to be copied and orders that upon any failure of the defendant to comply with the terms of the order, he shall be cited to appear before the court to show

cause why he should not be held guilty of contempt, the contempt proceeding is pending in the court below and the trial court's order is not final and therefore can be appealed only by compliance with the interlocutory appeal provision in subsection (b) of this section. *Payne v. Presley*, 169 Ga. App. 36, 311 S.E.2d 849 (1983).

Dismissal of citation for contempt is not an appealable judgment. *Fulford v. Fulford*, 225 Ga. 510, 170 S.E.2d 27 (1969).

Review of Collateral Judgments, Rulings, or Orders

Review only of orders which are raised on appeal of appealable order is afforded by subsection (c). *Vowell v. Carmichael*, 235 Ga. 410, 219 S.E.2d 735 (1975).

Where no enumeration of error is made to order appealable under subsection (a) or (b), court will not review order which would have been reviewed under subsection (c). *Gano v. Gano*, 243 Ga. 564, 255 S.E.2d 59 (1979).

Matters not properly presented. — Nothing in subsection (c) requires court to pass upon matter not properly presented for decision. *Freeman v. City of Valdosta*, 119 Ga. App. 345, 167 S.E.2d 170 (1969).

Subsection (c) is inapplicable to nonappealable orders entered by trial court subsequent to appeal. *Vowell v. Carmichael*, 235 Ga. 410, 219 S.E.2d 735 (1975).

Moot Issues

Without supersedeas, complaint that action ordered is erroneous becomes moot. — Without supersedeas, action ordered by trial court must be done as ordered. And once the ordered action is taken, complaint about its being erroneously ordered becomes moot. *Padgett v. Cowart*, 232 Ga. 633, 208 S.E.2d 455 (1974).

To prevent appeal of order requiring action which may affect rights of litigants from becoming moot, it is necessary for appealing party to obtain a supersedeas. If a supersedeas is not obtained, then ordered action takes place as ordered, and the appeal becomes moot. *Padgett v. Cowart*, 232 Ga. 633, 208 S.E.2d 455 (1974).

If trial court refuses to grant supersedeas, party may request same from appellate court. *Padgett v. Cowart*, 232 Ga. 633, 208 S.E.2d 455 (1974).

Denial of summary judgment after verdict and judgment is a moot issue. *Trade City G.M.C., Inc. v. May*, 154 Ga. App. 371, 268 S.E.2d 421 (1980).

After verdict and judgment have been entered, Court of Appeals cannot review judgment denying motion for summary judgment because that issue became moot when court heard evidence at trial. *Preferred Risk Mtt. Ins. Co. v. Thomas*, 153 Ga. App. 154, 264 S.E.2d 662 (1980).

Application

1. In General

Editor's notes. — In light of the similarity of the issues dealt with by the provisions, decisions under former Code 1933, § 6-701 as it read prior to revision by Ga. L. 1965, p. 18, § 1 are included in the annotations for this Code section.

Failure to comply with subsection (b). — The denial of a motion to recuse was not a final order and failure to comply with the provisions of subsection (b) mandated the dismissal of the appeal of that motion. *Warringer v. Warringer*, 204 Ga. App. 86, 418 S.E.2d 446 (1992).

Before appeal may be made, judgment appealed from must be in writing. *Merrill v. State*, 128 Ga. App. 403, 196 S.E.2d 876 (1973).

Final judgment cannot be amended at subsequent term. *Redmond v. Walters*, 228 Ga. 417, 186 S.E.2d 93 (1971).

Nunc pro tunc certificate of immediate review is without efficacy to support appeal. *Whitlock v. State*, 124 Ga. App. 599, 185 S.E.2d 90 (1971).

Nunc pro tunc entry cannot be used to correct failure to comply with mandatory requirements of Appellate Practice Act. *Blackstone v. State*, 131 Ga. App. 666, 206 S.E.2d 553 (1974).

Nunc pro tunc entry of certificate for immediate review cannot revive right of appeal which has expired under subsection (b). *Whitlock v. State*, 124 Ga. App. 599, 185 S.E.2d 90 (1971).

Filing of notice of appeal acts as supersedeas even in interlocutory appeal. *Lawrence v. Whittle*, 146 Ga. App. 686, 247 S.E.2d 212 (1978).

After the correct procedure is followed, the notice of appeal acts as a supersedeas in

Application (Cont'd)**1. In General (Cont'd)**

the case. *Carter v. Data Gen. Corp.*, 162 Ga. App. 244, 291 S.E.2d 99 (1982).

Appellee in interlocutory appeal cannot voluntarily dismiss claim involved after notice of appeal is filed. *Sacks v. McCrory*, 156 Ga. App. 174, 274 S.E.2d 158 (1980).

Untimely filed notice of appeal is not grounds for dismissal where appellant was entirely without fault in regard to the delay, but rather the delay was caused by the clerk's error. *Western Elec. Co. v. Capes*, 164 Ga. App. 353, 296 S.E.2d 381 (1982), cert. vacated, 250 Ga. 890, 302 S.E.2d 108 (1983).

Notice of appeal prevents plaintiff from dismissing case while any issue is on appeal.

— Filing of notice of interlocutory appeal acts as supersedeas so as to prevent plaintiff from dismissing case while any issue is on appeal under § 9-11-41(a). To hold otherwise would subject appellant to additional costs and possible harassment by appellee who dismisses pending suit when faced with reversal on interlocutory appeal; appellee could then refile his lawsuit, and require appellant to again bring appeal; just as § 9-11-41(a) prevents such actions where appeal is taken from final judgment, so too it applies in instances of appeal from interlocutory rulings. *Steele v. Steele*, 243 Ga. 522, 255 S.E.2d 43 (1979).

Two methods for appealing orders as to less than all claims of parties. — There are two principal methods by which appeal might be brought from orders in multi-claim party cases as to less than all claims or parties involved. One is that complaining party may obtain certificate of immediate review from trial judge under subsection (b) of this section. The second method is where trial judge enters order upon express determination that there are no just reasons of delay and upon express direction for entry of judgment under provision of § 9-11-54(b). Where second method is used, appellate court must still determine whether judgment rendered meets requirements of finality contained in this section. *J.C. Penney Co. v. Malouf Co.*, 125 Ga. App. 832, 189 S.E.2d 453 (1972), rev'd on other grounds, 230 Ga. 140, 196 S.E.2d 145 (1973).

Where order appealed from adjudicates less than all claims and does not provide for

the entry of a final judgment as provided in § 9-11-54(b), nor is there a certificate as provided by subsection (b) of this section, there is no appealable judgment. *Givens v. Gray*, 124 Ga. App. 152, 183 S.E.2d 29 (1971).

Judgment need not be attacked by one of the methods provided in § 9-11-60, as any final judgment may be timely appealed. *Hiscock v. Hiscock*, 227 Ga. 329, 180 S.E.2d 730 (1971).

Orders entered subsequent to the filing of a notice of appeal are appealable only pursuant to a subsequently filed notice of appeal. An enumeration of error which addresses the subsequent grant of summary judgment on the issue of damages is not predicated upon a timely filed notice of appeal from that order or from any other appealable order which encompasses that subsequent ruling. *Costanzo v. Jones*, 200 Ga. App. 806, 409 S.E.2d 686, cert. denied, 200 Ga. App. 895, 409 S.E.2d 686 (1991).

Motion for rehearing pending when notice of appeal is filed. — Motion for rehearing, undisposed of at time notice of appeal is filed does not cause appeal to be premature, inasmuch as pendency of such motion does not toll time for filing appeal. *George v. Lee*, 118 Ga. App. 302, 163 S.E.2d 262 (1968).

Prior nonappealable order may be used as enumeration of error whenever appeal is brought to Court of Appeals from final judgment. *Kilgore v. Kennesaw Fin. Co.*, 128 Ga. App. 120, 195 S.E.2d 799 (1973).

Where judgment can be appealed under certificate of appealability, plaintiffs have right to elect to await entry of final judgment disposing of case entirely before entering appeal, and in so doing they are authorized to enumerate error on prior judgment. *Goolsby v. Allstate Ins. Co.*, 130 Ga. App. 881, 204 S.E.2d 789 (1974).

Pursuant to subsection (d), defendant would be entitled to enumerate as error any other prior or contemporaneous rulings in the case. Defendant would not, however, be entitled to enumerate as error any and all other subsequent rulings in the case. *Costanzo v. Jones*, 200 Ga. App. 806, 409 S.E.2d 686, cert. denied, 200 Ga. App. 895, 409 S.E.2d 686 (1991).

On appeal from denial of temporary alimony, error may be assigned on temporary custody order included in same order, with-

out reference to appealability of custody order standing alone. *Gray v. Gray*, 226 Ga. 767, 177 S.E.2d 575 (1970).

Order disqualifying solicitor and appointing special prosecutor was directly appealable. *State v. Evans*, 187 Ga. App. 649, 371 S.E.2d 432, cert. denied, 187 Ga. App. 908, 371 S.E.2d 432 (1988).

Grant of motion to dismiss. — Appeal involving the grant of a motion to dismiss for failure to follow a procedural requirement of the Georgia Business Corporation Code was not convertible to a summary proceeding; as such, the general appellate process was applicable. *McGregor v. Stachel*, 200 Ga. App. 324, 408 S.E.2d 118 (1991).

Decisions of administrative agencies. — Where taxpayer did not file application for discretionary appeal from decision of superior court reviewing decision of Department of Revenue, but chose to appeal directly to Supreme Court pursuant to subsection (a) of this section, such appeal was dismissed for failure to comply with procedure for appeal from decisions of administrative agencies required by § 5-6-35. *Plantation Pipe Line Co. v. Strickland*, 249 Ga. 829, 294 S.E.2d 471 (1982).

Resolution of merits of administrative appeal was not authorized by subsection (d), where holdings on appeal that the appellant was not entitled to declaratory-judgment and mandamus remedies were predicated upon the availability of the administrative appeal to the superior court and not upon the appellant's entitlement to judicial relief therein. Consequently, appellate review of the merits of the administrative appeal would not have affected the holdings sustaining the superior court's denial of mandamus and declaratory-judgment relief. *Rybert & Co. v. City of Atlanta*, 258 Ga. 347, 368 S.E.2d 739 (1988), overruled on other grounds, *Southern States Landfill, Inc. v. City of Atlanta Bd. of Zoning Adjustments*, 261 Ga. 759, 410 S.E.2d 721 (1991).

Appeal from prosecution of city ordinance in city court. — Where uniform traffic citation and complaint form was used to charge an offense in a constitutional city court, but solicitor subsequently amended the form to allege a violation of a city ordinance, jurisdiction of an appeal lay in the superior court rather than the Court of Appeals. *Parnell v. City of Atlanta*, 173 Ga. App. 602, 327 S.E.2d 569 (1985).

Failure to pursue interlocutory review of order which is not final judgment. — Where trial court's order does not constitute a final judgment, an appeal therefrom is premature where a party fails to pursue the procedure for interlocutory review. *Commercial Bank v. Simmons*, 157 Ga. App. 391, 278 S.E.2d 53 (1981).

Other claims pending. — Order granting writ of possession was not subject to direct appeal, because other claims remained pending in the trial court (e.g., issue of commissions owed to defendant and past rent due and owing to plaintiff). *Whiddon v. Stargell*, 192 Ga. App. 826, 386 S.E.2d 884 (1989).

A case involving a "domestic relations" issue wherein appellant sought domestication and "correction" of a foreign divorce decree, normally within the jurisdiction of the Court of Appeals, also involved claims based upon an unincorporated settlement agreement which raised no "domestic relations" issue and, therefore, the Supreme Court had jurisdiction over the direct appeal from the grant of summary judgment in favor of the former husband as to the former wife's claims for specific performance of the settlement agreement and jurisdiction over the rulings on all the former wife's claims, including the "domestic relations" claim. *Eickhoff v. Eickhoff*, 263 Ga. 498, 435 S.E.2d 914 (1993).

Announcement of intent to appeal does not terminate juvenile transfer proceedings. — The announcement by counsel of his intent to appeal a denial of his plea of double jeopardy did not require the trial court to terminate juvenile transfer proceedings. *In re T.E.D.*, 169 Ga. App. 401, 312 S.E.2d 864 (1984).

Appeal from the denial of a post-judgment discovery order could not be used as a vehicle for obtaining appellate review of the final judgment entered in the case, where the time for appealing that judgment had otherwise expired. *Barton v. Anthony*, 194 Ga. App. 500, 391 S.E.2d 25 (1990).

Denial of "motion for continuance." — An appeal taken from the denial of a "Motion for Continuance or Motion in Opposition to Entry of Judgment of Bond Forfeiture," was dismissed on the ground that it was taken from an order or judgment which was not directly appealable. *Taylor v. State*,

Application (Cont'd)**1. In General (Cont'd)**

194 Ga. App. 245, 390 S.E.2d 601 (1990).

Judgment entitling landlord to retain a \$2,500 earnest money deposit as liquidated damages, and requiring tenants to pay \$1200 as increased rent, exceeded \$2,500, and, accordingly, was subject to direct appeal. *Alexander v. Steining*, 197 Ga. App. 328, 398 S.E.2d 390 (1990).

Judgment condemning property was not final because the issue of just and adequate compensation was still pending below. *Cook v. Georgia Power Co.*, 204 Ga. App. 119, 418 S.E.2d 451 (1992).

No express final judgment. — Since there was no determination that there was no just reason for delay and express direction of final judgment pursuant to § 9-11-54(b), the orders which plaintiff would appeal were interlocutory and not appealable without compliance with the interlocutory appeal procedure of subsection (b) of this section. *Wright v. Millines*, 212 Ga. App. 453, 442 S.E.2d 300 (1994).

Orders requiring supersedeas bonds not final. — Since there were matters still pending in the cases, orders requiring supersedeas bonds were not final and thus, not subject to direct appeal. *Pruett v. Commercial Bank*, 211 Ga. App. 692, 440 S.E.2d 85 (1994).

Order in partition proceeding appointing commissioners and ordering sale of land. — Where application is made to superior court for partition of land by sale, and judge, after hearing evidence, appoints commissioners, and orders them to sell the land, such judgment is so far final as to authorize objecting party to bring case to Supreme Court by proper bill of exceptions (see §§ 5-6-49, 5-6-50). *Lanier v. Gay*, 195 Ga. 859, 25 S.E.2d 642 (1943) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Judgment denying motion to dismiss motion for new trial where no motion for judgment n.o.v. is pending, would be one from which direct appeal could be taken. *Fulton v. Chattanooga Publishing Co.*, 98 Ga. App. 473, 105 S.E.2d 922 (1958) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order and judgment of trial court disal-

lowing and striking amendment to petition leaves case pending in court below. Such order is not a final disposition of case in trial court. *Virginia Well & Supply Co. v. Landers*, 99 Ga. App. 397, 108 S.E.2d 756 (1959) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Where trial judge vacates his order overruling demurrers (now motion to dismiss) to petition, there has been no final judgment in case and filing of bill of exceptions (see §§ 5-6-49, 5-6-50) to Court of Appeals is premature. *Rushin v. Winecoff*, 94 Ga. App. 413, 94 S.E.2d 755 (1956) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Until petition for interpleader is dismissed, or otherwise disposed of, cause is pending in trial court. *Grogan v. Bank of Acworth*, 212 Ga. 421, 93 S.E.2d 569 (1956) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order sustaining demurrer (now motion to dismiss) to motion made pursuant to § 15-19-7 to require counsel to produce, prove and show authority under which he appears in cause and to disclose name of party or parties who employed him and name of real party at interest is not a final judgment that may be reviewed by bill of exceptions (see §§ 5-6-49, 5-6-50) to Court of Appeals. *Carlock v. Emery*, 104 Ga. App. 783, 123 S.E.2d 309 (1961) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Denial of motion for change of venue on ground of inability to obtain fair trial. — Exception to refusal of motion for change of venue, based solely on ground that defendant cannot obtain fair trial in county in which he is under indictment, cannot form basis of direct bill of exceptions (see §§ 5-6-49, 5-6-50) to Court of Appeals prior to final judgment in case. *Nickles v. State*, 86 Ga. App. 284, 71 S.E.2d 574 (1952) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Striking of plea of former jeopardy, filed by accused in criminal case, is not a final judgment, and a direct bill of exceptions (see §§ 5-6-49, 5-6-50) assigning error upon judgment striking plea is prematurely brought and must be dismissed. *McNeal v. State*, 88 Ga. App. 333, 76 S.E.2d 640 (1953)

(decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Judgment sustaining or striking plea of res judicata is not final or otherwise within meaning of section. *Stout v. Pate*, 209 Ga. 536, 74 S.E.2d 458 (1953) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Judgment sustaining plea of res judicata to suit, but not ordering dismissal of action, is not "final," within meaning of section. *Harris v. Stowers*, 192 Ga. 215, 15 S.E.2d 193 (1941) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Determination of merits of traverse is a mere interlocutory proceeding, and exceptions to rulings in reference thereto may be included in main bill of exceptions (see §§ 5-6-49, 5-6-50) which excepts also to error alleged to have been committed in trial of case, after determination of issue raised by traverse. *Ragsdale v. Middlebrooks*, 50 Ga. App. 8, 176 S.E. 825 (1934) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Judgment declaring entry of default void is no more final than judgment opening default. *Ryles v. Moore*, 191 Ga. 661, 13 S.E.2d 672 (1941) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Judgment affirming order of State Board of Workmen's (now Workers') Compensation dismissing plea in abatement filed before board is not a final judgment and is not subject to appeal. *Scarborough v. Portress*, 111 Ga. App. 875, 143 S.E.2d 555 (1965) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order appointing partitioners is not a final judgment within meaning of section. *Wood v. W.P. Brown & Sons Lumber Co.*, 199 Ga. 167, 33 S.E.2d 435 (1945) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order in partition proceeding. — In partition proceeding where division of lands among co-owners is sought by having, under § 44-6-160 the lands divided by metes and bounds, an order of court adjudicating what are respective interests of parties in and to

realty involved, and appointing partitioners to divide same in accordance therewith, and make return to court, is merely interlocutory. *Lanier v. Gay*, 195 Ga. 859, 25 S.E.2d 642 (1943) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Interlocutory order or judgment refusing to dissolve receivership cannot be reviewed in Supreme Court on direct bill of exceptions (see §§ 5-6-49, 5-6-50). *Melton v. Holland*, 204 Ga. 539, 50 S.E.2d 211 (1948) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Direction to receivers to collect rents from defendant, or exclude him from property, was an administrative order to carry into effect former order appointing receivers (which order was by consent of all parties), and is not such a final judgment as will support a direct bill of exceptions (see §§ 5-6-49, 5-6-50). *Melton v. Holland*, 204 Ga. 539, 50 S.E.2d 211 (1948) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order approving, disapproving or rejecting auditor's report. — Whether the court approves, disapproves, or rejects report of auditor, its ruling in this matter is only an interlocutory order which does not amount to a final judgment. *Jordan v. Harber*, 182 Ga. 621, 186 S.E. 670 (1936) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order overruling exceptions of law and of fact to auditor's report did not amount to final judgment, nor would judgment sustaining such exceptions, as sought by plaintiff in error, have been a final disposition of the cause. *Moncrief v. Rimer*, 181 Ga. 4, 181 S.E. 169 (1935) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order overruling exceptions to auditor's report. — Order overruling exceptions to auditor's report is not a final judgment within meaning of section, unless court made auditor's report the judgment of the court, thus adjudicating rights of parties on merits. *Farrar v. Ainsworth*, 207 Ga. 185, 60 S.E.2d 366 (1950) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Application (Cont'd)**2. Certificates of Immediate Review****Interlocutory appeals placed on equal footing with appeals from final judgments.**

— Provision in subsection (b) that ... procedure following filing of notice of appeal shall be same as in appeal from final judgment, indicates legislative intent that, after filing notice of appeal, status quo is to be maintained just as it would be if appeal were from a final judgment, and mandates that, once supersedeas attaches, interlocutory order shall have same procedural status and dignity as a final judgment; therefore, since § 9-11-41(a) would not permit plaintiff-appellee to dismiss his case while final judgment in his favor is on appeal, thereby robbing defendant-appellant of opportunity to seek reversal of judgment; it would neither permit plaintiff-appellee to do so in interlocutory context. *Lawrence v. Whittle*, 146 Ga. App. 686, 247 S.E.2d 212 (1978).

Trial judge has broad discretion. — Trial judge in determining whether an otherwise interlocutory order might be reviewed prior to final judgment is given carte blanche authority. *Lee v. Smith*, 119 Ga. App. 808, 168 S.E.2d 880 (1969).

Where trial judge leaves jurisdiction after rendering order. — Where trial judge, after rendering order, departs from jurisdiction so as to make it impossible to request of him a timely certificate for immediate appellate review, request, if timely, may be presented for grant or denial to another judge of same court having authority to hear emergency matters. *Tingle v. Harvill*, 125 Ga. App. 312, 187 S.E.2d 536 (1972); *Freemon v. Dubroca*, 177 Ga. App. 745, 341 S.E.2d 276 (1986).

Certificate of appealability is not itself a judgment in the cause, but is simply an order allowing judgment or order already entered to be appealed and reviewed. *G.M.J. v. State*, 130 Ga. App. 420, 203 S.E.2d 608 (1973).

Certificate of immediate review to interlocutory order must be followed by petition to appellate court. Where this is not done, appeal is premature and must be dismissed. *Home Mart Bldg. Centers, Inc. v. Wallace*, 139 Ga. App. 49, 228 S.E.2d 22 (1976).

Where a party does not file an application for interlocutory appeal within 10 days of the granting of the trial court's certificate for

immediate review, the appeal is premature and must be dismissed. *Graves v. Dean*, 166 Ga. App. 186, 303 S.E.2d 751 (1983).

Where defendant obtained a certificate of immediate review but failed to apply to the court for permission to file an interlocutory appeal in accordance with this section, the appeal was dismissed for lack of jurisdiction. *State v. Crapse*, 173 Ga. App. 100, 325 S.E.2d 620 (1984), but see *Hubbard v. State*, 176 Ga. App. 622, 337 S.E.2d 60 (1985).

Because it is important to have the defendant's double jeopardy claim adjudicated before trial in order to prevent harm to the defendant, the appellate court has jurisdiction to hear an appeal from the denial of the defendant's § 17-7-170 motion even though the defendant did not apply for permission to file an interlocutory appeal. *Hubbard v. State*, 176 Ga. App. 622, 337 S.E.2d 60 (1985).

Untimely, invalid applications for immediate review cannot be revived. — Amendments offered as applications for immediate review and tendered approximately three months after expiration of time for filing such applications under subsection (b) do not serve to revive invalid appeals. *Summer Tree Club Apts. Assocs. v. Graves Constr. Co.*, 140 Ga. App. 214, 230 S.E.2d 503 (1976).

Unless certificate is filed within time required, party seeking review must await final judgment. — Certificate for immediate review must be filed with clerk of trial court within ten-day period in order to secure immediate review of nonfinal judgment; if this is not done, party seeking review will merely have to await final judgment in case before he can obtain review of interlocutory judgments entered in trial court. *Turner v. Harper*, 231 Ga. 175, 200 S.E.2d 748 (1973).

Erroneous certification under § 9-11-54(b) may be treated as certification pursuant to this section. — Where trial court erroneously enters certification pursuant to § 9-11-54(b), appellate court may treat certification as one entered pursuant to subsection (b) of this section. *Georgia Farm Bureau Mut. Ins. Co. v. Wall*, 242 Ga. 176, 249 S.E.2d 588 (1978).

Time limitations of subsection (b). — However, because in cases in which erroneous certification under § 9-11-54(b) is treated as certification pursuant to this section, the cause will have been treated by trial

court and parties as an appeal from a final judgment, time limitations imposed by subsection (b) on parties and this court are not applicable. *Georgia Farm Bureau Mut. Ins. Co. v. Wall*, 242 Ga. 176, 249 S.E.2d 588 (1978).

Certificate stating review "may" be had. — Certificate ordering new trial, signed by trial judge, stating that immediate review "may" be had rather than "should" be had, as provided by section, is in substantial compliance with the law and is not ground for dismissal. *State Hwy. Dep't v. Lord*, 123 Ga. App. 178, 179 S.E.2d 780 (1971).

Order allowing 30 days to appeal before case shall proceed. — Court order denying motion which states that movant will be allowed 30 days in which to appeal order and if no appeal is made within that period case shall proceed, is not certification required by subsection (b) in that there has been no certification of importance of immediate review. *Alexander v. State*, 122 Ga. App. 331, 176 S.E.2d 633 (1970).

Where ten-day period expires on Sunday and Monday is a holiday. — Where ten-day limitation for securing certificate certifying denial of summary judgment for review expired on Sunday, October 11 and Monday, October 12, was Columbus Day, a legal holiday, certificate for review obtained on October 13 was obtained within time. *Allstate Ins. Co. v. Cody*, 123 Ga. App. 265, 180 S.E.2d 596 (1971).

Denial of superfluous application does not block available avenues of appeal which caused application to be superfluous. *South-east Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980).

Appeal from decision of reviewing court regarding administrative decision. — Under § 50-13-20 the Court of Appeals has jurisdiction only of a final judgment of a reviewing court regarding an administrative decision.

This section, providing for interlocutory appeal upon certificate of immediate review, does not govern. *Hardison v. Booth*, 160 Ga. App. 69, 286 S.E.2d 60 (1981).

Certification for review by one judge of another's decision. — Where one judge's order dismissing defendant's motion to suppress evidence was not issued pursuant to notice and opportunity for hearing and where the trial judge (another judge) in effect reasserted such dismissal before certifying it for review, the Court of Appeals has jurisdiction to consider the order on appeal because there is no jurisdictional defect in the manner in which the appeal reached that court. *Caudill v. State*, 157 Ga. App. 415, 277 S.E.2d 773 (1981).

Certificate required. — Where defendant's motion to dismiss his indictment for cocaine possession for failure to comply with § 42-6-20, Art. III(a), was denied by the trial court, but no certificate was contained in the record, this issue was one for which a certificate of immediate review and petition for interlocutory appeal were required so the appeal must be dismissed under § 5-6-34(b); this is not a question involving speedy trial rights under § 17-7-170, which would be directly appealable. *Miller v. State*, 180 Ga. App. 710, 350 S.E.2d 313 (1986).

Denial of misnamed motion followed by certificate. — Where the trial court's denial of appellant's misnamed motion seeking to dismiss a third-party intervenor was timely followed by a certificate of immediate review, and appellant timely sought appeal of it "pursuant to § 5-6-34(b)," jurisdiction was properly lodged in the Court of Appeals by interlocutory appeal. *Brooks v. Carson*, 194 Ga. App. 365, 390 S.E.2d 859 (1990), overruled on other grounds, *Mayor of City of Savannah v. Norman J. Bass Constr. Co.*, 264 Ga. 16, 441 S.E.2d 63 (1994).

OPINIONS OF THE ATTORNEY GENERAL

Appeals from a municipal court conviction of a traffic offense may lie in the Court of Appeals or in the superior court depend-

ing on the status of the municipal court and the nature of the offense. 1985 Op. Att'y Gen. No. U85-18.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 47-64, 856-866. 5 Am. Jur. 2d, Appeal and Error, §§ 702-705, 723-729.

C.J.S. — 4 C.J.S., Appeal and Error, § 78 et seq.

ALR. — Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 ALR 725.

Right to appeal from order releasing one in extradition proceedings, 5 ALR 1156.

Judgment on claim as bar to action to recover amount of payment which was not litigated in previous action, 13 ALR 1151.

Appeal as affecting time allowed by judgment or order appealed from for the performance of a condition affecting a substantive right or obligation, 28 ALR 1029.

Coram nobis on ground of newly discovered evidence, 33 ALR 84.

First decision of intermediate court as law of the case on appeal to court of last resort from subsequent decision, 41 ALR 1078; 118 ALR 1286.

Conduct of party in court room tending improperly to influence jury as ground for reversal or new trial, 57 ALR 62.

Abatement of action which does not survive, by death of party pending appeal or writ of error, 62 ALR 1048.

Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case as against codefendant, 80 ALR 1186; 114 ALR 759.

Power of appellate court to reconsider its decision after mandate has issued, 84 ALR 579.

Criticism in judge's charge to jury of argument of defendant's counsel in criminal case, 86 ALR 899.

Who entitled to appeal from decree admitting will to probate or denying probate, 88 ALR 1158.

Right of bankrupt after adjudication to take or prosecute appeal from or otherwise review a judgment against him, 92 ALR 291.

Change of law after decision of lower court as affecting decision on appeal or error, 111 ALR 1317; 151 ALR 987.

Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case as against codefendant, 114 ALR 759.

Reception of incompetent evidence in criminal case tried to court without jury as ground of reversal, 116 ALR 558.

First decision of intermediate court as law of case on appeal to court of last resort from subsequent decision, 118 ALR 1286.

Remedy of one convicted of crime while insane, 121 ALR 267.

Res judicata as regards decisions or awards under workmen's compensation acts, 122 ALR 550.

Ruling against defendant's attack upon indictment or information as subject to review by higher court, before trial, 133 ALR 934.

Application for or acceptance of executive clemency as affecting appellate proceedings or motion for new trial, 138 ALR 1162.

Adequacy of remedy by appeal in criminal cases to preclude prohibition sought on the ground of lack or loss of jurisdiction, 141 ALR 1262.

Finality, for purposes of appeal, of judgment in federal court which disposes of plaintiff's claim, but not of defendant's counterclaim, or vice versa, 147 ALR 583.

Order upon application for suppression in criminal case of evidence wrongly seized by government as appealable, 156 ALR 1207.

Effect of, and remedies for, exclusion of eligible class of persons from jury list in civil case, 166 ALR 1422.

Order granting or denying revival of action after death of party as final order subject to appeal, 167 ALR 261.

Order granting or refusing motion for temporary alimony or suit money in divorce action as appealable, 167 ALR 360.

Appealability of ruling or demurrer to plea, answer, or reply, 171 ALR 1433.

Appealability of order entered on motion to strike pleading, 1 ALR2d 422.

Finality of judgment or decree for purposes of review as affected by provision for future accounting, 3 ALR2d 342.

Questions or legal theories affecting trust estates as subject to consideration on appeal though not raised below, 11 ALR2d 317.

Appealability of order granting or denying right of intervention, 15 ALR2d 336.

Appealability of order with respect to motion for joinder of additional parties, 16 ALR2d 1023.

Appealability of federal district court order denying motion to remand cause to state court, 21 ALR2d 760.

Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit, 26 ALR2d 446.

Appealability of order overruling or sustaining motion to quash or set aside service of process, 30 ALR2d 287.

What constitutes final judgment within provision or rule limiting application for new trial to specified period thereafter, 34 ALR2d 1181.

Appealability of order pertaining to pre-trial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Right of appeal from order on application for removal of personal representative, guardian, or trustee, 37 ALR2d 751.

Judicial relief other than by dissolution or receivership in cases of intracorporate deadlock, 47 ALR2d 365.

Appealability of order denying motion for directed verdict or for judgment notwithstanding the verdict where movant has been granted a new trial, 57 ALR2d 1198.

Ruling on motion to quash execution as ground of appeal or writ of error, 59 ALR2d 692.

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 ALR2d 158.

Participation in, acceptance of, or submission to new trial as precluding appellate review of order granting it or of issue determined in first trial, 67 ALR2d 191.

Appealability of order appointing, or refusing to appoint, receiver, 72 ALR2d 1009.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 ALR2d 801.

Appealability of order relating to forfeiture of bail, 78 ALR2d 1180.

Appealability of order relating to transfer, on jurisdictional grounds, of cause from one state court to another, 78 ALR2d 1204.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 ALR2d 1352.

Retroactive effect on appeal from judgment previously entered of statute shorten-

ing time allowed for appellate review, 81 ALR2d 417.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 88 ALR2d 1275.

Appealability of order entered in connection with pretrial conference, 95 ALR2d 1361.

Appealability of order arresting judgment in criminal case, 98 ALR2d 737.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 ALR3d 1272.

Appealability of order directing payment of money into court, 15 ALR3d 568.

Reviewability of order denying motion for summary judgment, 15 ALR3d 899.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency, 16 ALR3d 714.

Appealability of order staying, or refusing to stay, action because of pendency of another action, 18 ALR3d 400.

Appealability of order granting, extending, or refusing to dissolve temporary restraining order, 19 ALR3d 403.

Appealability of order refusing to grant or dissolving temporary restraining order, 19 ALR3d 459.

Appealability of acquittal from or dismissal of charge of contempt of court, 24 ALR3d 650.

Appealability of contempt adjudication or conviction, 33 ALR3d 448.

Development, since *Hickman v. Taylor*, of attorney's "work product" doctrine, 35 ALR3d 412; 27 ALR4th 568.

Appealability of order denying right to proceed in form of class action — state cases, 54 ALR3d 595.

Appealability of state court order granting or denying consolidation, severance, or separate trials, 77 ALR3d 1082.

Appealability of order dismissing counterclaim, 86 ALR3d 944.

Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 ALR3d 1262.

Appealability of state court's order granting or denying motion to disqualify attorney, 5 ALR4th 1251.

Right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance — modern status, 11 ALR4th 399.

Relief other than by dissolution in cases of

intracorporate deadlock or dissension, 34 ALR4th 13.

Appealability of order suspending imposition or execution of sentence, 51 ALR4th 939.

5-6-35. Cases requiring application for appeal; contents, filing, and service of application; exhibits; response by opposing party; issuance of appellate court order regarding appeal; procedure; supersedeas.

(a) Appeals in the following cases shall be taken as provided in this Code section:

(1) Appeals from decisions of the superior courts reviewing decisions of the State Board of Workers' Compensation, the State Board of Education, auditors, state and local administrative agencies, and lower courts by certiorari or de novo proceedings; provided, however, that this provision shall not apply to decisions of the Public Service Commission and probate courts and to cases involving ad valorem taxes and condemnations;

(2) Appeals from judgments or orders in divorce, alimony, child custody, and other domestic relations cases including, but not limited to, granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child custody judgment or orders;

(3) Appeals from cases involving distress or dispossessory warrants in which the only issue to be resolved is the amount of rent due and such amount is \$2,500.00 or less;

(4) Appeals from cases involving garnishment or attachment, except as provided in paragraph (5) of subsection (a) of Code Section 5-6-34;

(5) Appeals from orders revoking probation;

(6) Appeals in all actions for damages in which the judgment is \$10,000.00 or less;

(7) Appeals, when separate from an original appeal, from the denial of an extraordinary motion for new trial;

(8) Appeals from orders under subsection (d) of Code Section 9-11-60 denying a motion to set aside a judgment or under subsection (e) of Code Section 9-11-60 denying relief upon a complaint in equity to set aside a judgment;

(9) Appeals from orders granting or denying temporary restraining orders;

(10) Appeals from awards of attorney's fees or expenses of litigation under Code Section 9-15-14; and

(11) Appeals from decisions of the state courts reviewing decisions of the magistrate courts by de novo proceedings so long as the subject matter is not otherwise subject to a right of direct appeal.

(b) All appeals taken in cases specified in subsection (a) of this Code section shall be by application in the nature of a petition enumerating the errors to be urged on appeal and stating why the appellate court has jurisdiction. The application shall specify the order or judgment being appealed and, if the order or judgment is interlocutory, the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.

(c) The applicant shall include as exhibits to the petition a copy of the order or judgment being appealed and should include a copy of the petition or motion which led directly to the order or judgment being appealed and a copy of any responses to the petition or motion. An applicant may include copies of such other parts of the record or transcript as he deems appropriate. No certification of such copies by the clerk of the trial court shall be necessary in conjunction with the application.

(d) The application shall be filed with the clerk of the Supreme Court or the Court of Appeals within 30 days of the entry of the order, decision, or judgment complained of and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties as provided by law, except that the service shall be perfected at or before the filing of the application. When a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

(e) The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The response may point out that the decision of the trial court was not error, or that the enumeration of error cannot be considered on appeal for lack of a transcript of evidence or for other reasons.

(f) The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the application was filed.

(g) Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, shall file a notice of appeal as provided by law. The procedure thereafter shall be the same as in other appeals.

(h) The filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as supersedeas.

(i) This Code section shall not affect Code Section 9-14-52, relating to practice as to appeals in certain habeas corpus cases. (Ga. L. 1979, p. 619, §§ 3, 6; Ga. L. 1982, p. 3, § 5; Ga. L. 1984, p. 22, § 5; Ga. L. 1984, p. 599, § 2; Ga. L. 1986, p. 1591, § 2; Ga. L. 1988, p. 1357, § 1; Ga. L. 1991, p. 412, § 1; Ga. L. 1994, p. 347, § 2.)

The 1994 amendment, effective July 1, 1994, in subsection (f), substituted "30 days" for "15 days" and deleted "response of the opposing party or parties is filed with the court or, in the event that no response is filed, within 25 days of the date on which the" preceding "application was filed".

Cross references. — Petitions for alimony or child support when no divorce is pending, §§ 19-6-10, 19-6-11. Filings in clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Application for leave to appeal final judgment, Rules of the Supreme Court of the State of Georgia, Rule 25. Leave to appeal interlocutory order, Rules of the Court of Appeals of the State of Georgia, Rule 29.

Editor's notes. — Ga. L. 1986, p. 1591, § 3, not codified by the General Assembly, provided that that Act applies to actions filed or presented for filing on or after July 1, 1986, and to any action pending on July 1, 1986, with respect to any claim, defense, or other position which is first raised in the action on or after July 1, 1986.

Law reviews. — For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For annual survey of domestic relations law, see 35 Mercer L. Rev. 127 (1983). For article surveying recent developments in

administrative law, see 37 Mercer L. Rev. 503 (1985). For annual survey of administrative law, see 38 Mercer L. Rev. 17 (1986). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986). For article, "Battling the Many-Headed Hydra: Abusive Litigation Law in Georgia," see 25 Ga. St. B.J. 65 (1988). For article, "Intangible Tax Appeals After Blank v. Collins; The Uncertainty Continues," see 27 Ga. St. B.J. 78 (1990). For annual survey on law of domestic relations, see 42 Mercer L. Rev. 201 (1990). For article, "Let's Revise Appellate Procedure in Georgia," see 27 Ga. St. B.J. 135 (1991). For article, "Getting Certiorari Granted", 28 Ga. St. B.J. 90 (1991). For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991). For annual survey of domestic relations, see 43 Mercer L. Rev. 243 (1991). For article, "Appeals, Interlocutory and Discretionary Applications, and Post-Judgment Motions in the Georgia Courts: The Current Practice and the Need for Reform Legislation," see 44 Mercer L. Rev. 17 (1992).

For note, "Restrictions on the Right to Direct Appeal under Georgia's Appellate Practice Act," see 21 Ga. St. B.J. 43 (1984).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION APPLICATION

1. IN GENERAL
2. JUDGMENTS CONCERNING CHILD CUSTODY
3. DIVORCE
4. GARNISHMENT
5. REVOCATION OF PROBATION
6. DAMAGES WHERE JUDGMENT IS \$10,000.00 OR LESS
7. APPEALS UNDER § 9-11-60
8. ATTORNEY'S FEES OR EXPENSES
9. ZONING CASES

General Consideration

Purpose of section. — The clear purpose of this section is to permit the appellate courts to review expeditiously decisions of the superior courts reviewing decisions of administrative agencies without issuing an opinion in every such case. *Tri-State Bldg. & Supply, Inc. v. Reid*, 251 Ga. 38, 302 S.E.2d 566 (1983).

This Code section was enacted to ameliorate the appellate courts' massive case loads. *Scruggs v. Georgia Dep't of Human Resources*, 261 Ga. 587, 408 S.E.2d 103 (1991).

Applicability. — Section applies to all appeals specified in subsection (a) whether judgment be final, interlocutory, or summary. *Citizens & S. Nat'l Bank v. Rayle*, 246 Ga. 727, 273 S.E.2d 139 (1980).

Clear intent of paragraph (a)(1) is to give appellate courts (particularly Court of Appeals which has jurisdiction of workers' compensation cases not involving constitutionality of a law) discretion not to entertain an appeal where superior court has reviewed a decision of certain specified lower tribunals (i.e., two tribunals had already adjudicated the case). *Citizens & S. Nat'l Bank v. Rayle*, 246 Ga. 727, 273 S.E.2d 139 (1980).

Clear intent of paragraph (a)(2) is to give appellate courts (Supreme Court in divorce and alimony cases and Court of Appeals in child custody cases) discretion not to entertain appeal where superior or juvenile court has made a decision as to divorce, alimony, child custody, or contempt, the latter three of which are in large part discretionary and yet frequently appealed by the losing spouse. *Citizens & S. Nat'l Bank v. Rayle*, 246 Ga. 727, 273 S.E.2d 139 (1980).

Legislative intent. — The legislature required the discretionary appeals procedures for appeals from orders or judgments denying relief in cases seeking to set aside judgments. *Manley v. Jones*, 203 Ga. App. 173, 416 S.E.2d 744, cert. denied, 203 Ga. App. 907, 416 S.E.2d 744 (1992).

Constitutionality of paragraph (a)(8) classification. — The classification created by paragraph (a)(8) is reasonable and does not deny equal protection on the ground that while a party desiring to appeal an order denying a complaint in equity must file an application to appeal, a party desiring to appeal from an order granting a complaint in equity is entitled to a direct appeal.

Schiesser v. Ross, 256 Ga. 414, 349 S.E.2d 745 (1986).

Construed with § 5-6-34(b). — This Code section does not allow a party to ignore the interlocutory-application provision of § 5-6-34(b), when attempting to obtain appellate review. *Scruggs v. Georgia Dep't of Human Resources*, 261 Ga. 587, 408 S.E.2d 103 (1991); *Collier v. Evans*, 205 Ga. App. 764, 423 S.E.2d 704 (1992).

A party seeking appellate review from an interlocutory order must follow the interlocutory-application subsection, § 5-6-34(b), seek a certificate of immediate review from the trial court, and comply with the time limitations therein. *Scruggs v. Georgia Dep't of Human Resources*, 261 Ga. 587, 408 S.E.2d 103 (1991); *Collier v. Evans*, 205 Ga. App. 764, 423 S.E.2d 704 (1992).

Construed with § 5-6-34(d). — The phrase "following cases" in the introductory language of subsection (a) is construed to exclude those cases in which § 5-6-34(d) is applicable; thus, since appellants filed a motion styled as both a motion for a new trial and a motion to set aside the judgment, but it was clearly only a motion for new trial since it raised issues relating to the verdict but none relating to a motion to set aside under § 9-11-60(d), the Court of Appeals erred in dismissing the appeal. *Martin v. Williams*, 263 Ga. 707, 438 S.E.2d 353 (1994).

The underlying subject matter generally controls over the relief sought in determining the proper procedure to follow to appeal; thus, where a trial court issues a judgment listed in the direct appeal statute in a case whose subject matter is covered under the discretionary appeal statute, the discretionary application procedure must be followed when the party is appealing a judgment or order that is procedurally subject to a direct appeal. *Rebich v. Miles*, 264 Ga. 467, 448 S.E.2d 192 (1994).

In plaintiff's appeal of the denial of her request for a declaratory judgment, she could add issues relating to other rulings which might affect the proceedings below without regard to whether they were appealable standing alone. *Smith v. Department of Human Resources*, 214 Ga. App. 508, 448 S.E.2d 372 (1984).

Effect of 1986 amendment of § 40-13-28. — The 1986 amendment to § 40-13-28 that

General Consideration (Cont'd)

changed the scope of review in the superior court from a de novo investigation to a review of the record was not also intended to change the method of appeal from the superior court in such cases from discretionary appeals under paragraph (a)(1) of this section to direct appeals under § 5-6-34(a). *Brown v. City of Marietta*, 214 Ga. App. 840, 449 S.E.2d 540 (1994).

Two-step appellate review process: (1) initial appellate review of a record which will include copies of such parts of the trial court record or transcript as the appellant or appellee deem appropriate; (2) if the initial appellate review reveals that the appellant's enumerations of error are clearly without merit then the application for appeal is dismissed; if however the initial appellate review reveals that the appellant's enumerations of error are not clearly without merit, then the application for appeal is granted and a final appellate review ensues. *Harris v. Harris*, 245 Ga. 75, 263 S.E.2d 113 (1980).

Required contents of application. — This Code section requires a party to state if the order or judgment is interlocutory, and if it is interlocutory, the party must state "the need for interlocutory appellate review." *Scruggs v. Georgia Dep't of Human Resources*, 261 Ga. 587, 408 S.E.2d 103 (1991).

A discretionary application is generally required from the denial of a motion to set aside. *Beals v. Beals*, 203 Ga. App. 81, 416 S.E.2d 301, cert. denied, 203 Ga. App. 905, 416 S.E.2d 301 (1992).

Petition for discretionary appeal must adequately demonstrate reversible error. — Although paragraph (c) does not require an applicant for discretionary appeal to include relevant portions of the record or transcript as exhibits to the petition, a prudent applicant should support the assertions of error with relevant parts of the record or transcript so as to adequately demonstrate reversible error, unless the alleged errors are otherwise established as, for instance, by the agreement of the parties on appeal or by a quote or paraphrase from the record or transcript. *Harper v. Harper*, 259 Ga. 246, 378 S.E.2d 673 (1989).

Amount in controversy. — No application for discretionary review by the Court of Appeals need be made pursuant to para-

graph (a)(6) where the amount placed in controversy exceeds \$2,500 (now \$10,000.00). *Todd v. City of Brunswick*, 175 Ga. App. 562, 334 S.E.2d 1 (1985), aff'd, 255 Ga. 448, 339 S.E.2d 589 (1986).

For establishing jurisdiction pursuant to paragraph (a)(6), a judgment is comprised of principal, plus costs, plus interest at the legal rate accrued from the date of the filing of the judgment until the date of the filing of the notice of appeal. *Castleberry's Food Co. v. Smith*, 205 Ga. App. 859, 424 S.E.2d 33 (1992).

Standing. — The full board of the state board of workers' compensation neither granted the plaintiff's petition for a change of benefits nor authorized action which is adverse to the defendant; therefore, since the defendant was not aggrieved by the full board's award, he has no standing to appeal to the superior court from the full board's award. *Southwire Co. v. Hull*, 212 Ga. App. 131, 441 S.E.2d 293 (1994).

"Condemnation" construed. — The word "condemnations," as it appears in the exceptions to the rule of paragraph (a)(1), was intended by the legislature to except "inverse" as well as classic condemnation cases therefrom. *Brownlow v. City of Calhoun*, 198 Ga. App. 710, 402 S.E.2d 788 (1991).

Timely filing of the notice of appeal is an absolute prerequisite in order to confer jurisdiction on the appellate court. *White v. White*, 188 Ga. App. 556, 373 S.E.2d 824 (1988).

Filing before granting of application is timely. — While a failure to file a notice of appeal within ten days after the grant of an application will subject an appellant to dismissal, the filing of a notice of appeal after the judgment complained of is entered but before the granting of the application to appeal does not constitute a failure to timely file. *Wannamaker v. Carr*, 257 Ga. 634, 362 S.E.2d 53 (1987).

Date of judgment governs applicability of revised discretionary appeal procedures. — Discretionary appeal procedures were applicable to an action for damages not exceeding \$2,500.00 (now \$10,000.00) which was instituted prior to enactment of paragraph (a)(6) but in which judgment was entered after the effective date of that enactment. *Crimminger v. Habif*, 174 Ga. App. 440, 330 S.E.2d 164 (1985).

Where appellant fails to follow appeal procedures required in this section, appeal must be dismissed. *Walker v. City of Macon*, 166 Ga. App. 228, 303 S.E.2d 776 (1983); *In re J.E.P.*, 168 Ga. App. 30, 308 S.E.2d 712 (1983), *aff'd*, 252 Ga. 520, 315 S.E.2d 416 (1984).

Where the appellant fails to follow the proper procedures required by law when appealing from a decision of a superior court to which a writ of certiorari has been taken from a decision of a lower court, his appeal must be dismissed. *Crawford v. Goza*, 168 Ga. App. 565, 310 S.E.2d 1 (1983).

In appealing from a decision of the superior court reviewing a decision of a state administrative agency, where the appellant fails to obtain an order of the appellate court permitting the filing of the appeal, the appeal must be dismissed. *Risner v. Georgia Dep't of Labor*, 168 Ga. App. 242, 308 S.E.2d 582 (1983).

Where the appellants fail to obtain an order of court permitting the filing of an appeal in a garnishment proceeding, the appeal must be dismissed. *Mason v. Osburn Hdwe. & Supply Co.*, 174 Ga. App. 865, 331 S.E.2d 888 (1985).

Where applicable, requirements of this section are jurisdictional and the appellate court has no authority to accept an appeal in the absence of compliance with these statutory provisions. *Hogan v. Taylor County Bd. of Educ.*, 157 Ga. App. 680, 278 S.E.2d 106 (1981); *Crews v. State*, 175 Ga. App. 300, 333 S.E.2d 176 (1985); *Boyle v. State*, 190 Ga. App. 734, 380 S.E.2d 57 (1989).

The appellant's failure to comply with the discretionary appeals procedure of this Code section deprives the appellate court of jurisdiction, just as if he failed to file a timely notice of appeal. *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265 (on motion for rehearing), *cert. denied*, 199 Ga. App. 906, 405 S.E.2d 265 (1991).

Absent application pursuant to section, appeal is a nullity. — Where appellant appealed directly to the Supreme Court from the trial court's directed verdict without having made application pursuant to this section, the attempted appeal was a nullity, and could not supersede the judgment appealed from. *Reno v. Reno*, 247 Ga. 560, 277 S.E.2d 511 (1981).

Appeal from an award of attorney's fees in a domestic relations case is subject to the

appeal procedures of this section. *Sprague v. Sprague*, 253 Ga. 485, 321 S.E.2d 742 (1984).

Superior court dismissal without review on merits. — This section is not inapplicable to appeal from a superior court decision because the superior court dismissed the decision of a local tribunal without reviewing it on the merits. *Brewer v. Board of Zoning Adjustment*, 170 Ga. App. 351, 317 S.E.2d 327 (1984).

De novo appeal from magistrate court. — Regardless of whether the litigation was subsequently erroneously expanded in state court to include matters beyond the parameters of a de novo investigation, where the litigation reached the state court by means of a de novo appeal from magistrate court, in order to obtain appellate review of the state court judgment in the Court of Appeals, an application for appeal must be sought as required by paragraph (a)(11). *Handler v. Hulsey*, 199 Ga. App. 751, 406 S.E.2d 225, *cert. denied*, 199 Ga. App. 906, 406 S.E.2d 225 (1991).

Section not limited to judgments for plaintiffs. — This section applies to all judgments for \$2,500.00 (now \$10,000.00) or less that arise from an action for damages, and its application is not limited to judgments for plaintiffs. *Gardner v. Villa Monte Homes, Inc.*, 173 Ga. App. 896, 328 S.E.2d 565 (1985).

Paragraph (a)(6) requires that an application for discretionary review be filed when the amount placed in controversy by the claimant (plaintiff, counterclaimant or cross-claimant) is \$2,500 (now \$10,000.00) or less. *Brown v. Associates Fin. Servs. Corp.*, 175 Ga. App. 553, 333 S.E.2d 888 (1985), *aff'd*, 255 Ga. 457, 339 S.E.2d 590 (1986).

Actions in which only a few hundred dollars was sued for and nothing at all was recovered may be directly appealed. *Malloy v. Sexton*, 179 Ga. App. 769, 347 S.E.2d 648 (1986).

Appeals from the denial of a motion to set aside the judgment under § 9-11-60(d) are subject to the discretionary appeals procedure even when coupled with motions for a new trial or j.n.o.v. *Willard v. Wilburn*, 203 Ga. App. 393, 416 S.E.2d 798, *cert. denied*, 203 Ga. App. 908, 416 S.E.2d 798 (1992).

The denial of a "discretionary" motion to set aside is never appealable in its own right, nor does the filing of such a motion extend

General Consideration (Cont'd)

the time for filing an appeal. *Stone v. Dawkins*, 192 Ga. App. 126, 384 S.E.2d 225 (1989).

Order denying discovery is premature in the absence of a certificate of immediate review; therefore, the interlocutory appeal procedure set forth in Code § 5-6-34(b) is mandated. *Rogers v. Department of Human Resources*, 195 Ga. App. 118, 392 S.E.2d 713 (1990).

Cited in *Jackson v. Stuldivant*, 151 Ga. App. 784, 262 S.E.2d 642 (1979); *Cale v. Cale*, 244 Ga. 796, 264 S.E.2d 21 (1979); *Brown v. Brown*, 245 Ga. 44, 263 S.E.2d 438 (1980); *Hathcock v. Hathcock*, 245 Ga. 141, 263 S.E.2d 440 (1980); *Godbold v. Godbold*, 245 Ga. 121, 263 S.E.2d 440 (1980); *Sullins v. Bishop*, 245 Ga. 130, 263 S.E.2d 442 (1980); *Wilson v. Crosby*, 245 Ga. 140, 263 S.E.2d 442 (1980); *Cale v. Cale*, 245 Ga. 62, 264 S.E.2d 22 (1980); *Ritchie v. Ritchie*, 245 Ga. 199, 264 S.E.2d 230 (1980); *Martinez v. Martinez*, 245 Ga. 211, 264 S.E.2d 231 (1980); *Seymour v. Seymour*, 245 Ga. 211, 264 S.E.2d 232 (1980); *Horne v. Horne*, 245 Ga. 300, 265 S.E.2d 3 (1980); *McDonald v. McDonald*, 245 Ga. 355, 265 S.E.2d 57 (1980); *Austin v. Austin*, 245 Ga. 487, 265 S.E.2d 788 (1980); *Hilsman v. Hilsman*, 245 Ga. 555, 266 S.E.2d 173 (1980); *Mabry v. Mabry*, 245 Ga. 512, 266 S.E.2d 799 (1980); *Moore v. Employers Ins.*, 153 Ga. App. 589, 266 S.E.2d 811 (1980); *Reno v. Reno*, 245 Ga. 792, 267 S.E.2d 221 (1980); *Copeland v. Copeland*, 245 Ga. 656, 267 S.E.2d 253 (1980); *Cobb v. Cobb*, 245 Ga. 646, 267 S.E.2d 623 (1980); *Russell v. Hughes*, 154 Ga. App. 398, 268 S.E.2d 440 (1980); *Hendley v. Auto Owners Ins. Co.*, 154 Ga. App. 316, 268 S.E.2d 722 (1980); *Kiser v. Kiser*, 246 Ga. 153, 269 S.E.2d 860 (1980); *Tennis v. Hinch*, 246 Ga. 188, 269 S.E.2d 861 (1980); *Morgan v. Morgan*, 154 Ga. App. 595, 270 S.E.2d 94 (1980); *Myers v. Netherland*, 155 Ga. App. 153, 270 S.E.2d 407 (1980); *Brown v. Brown*, 246 Ga. 330, 272 S.E.2d 75 (1980); *Zusmann v. Zusmann*, 246 Ga. 341, 272 S.E.2d 75 (1980); *Yawn v. Yawn*, 246 Ga. 817, 272 S.E.2d 717 (1980); *Biggs v. Biggs*, 246 Ga. 520, 273 S.E.2d 403 (1980); *Waters v. Waters*, 246 Ga. 547, 273 S.E.2d 404 (1980); *Bradfield v. Jackson*, 156 Ga. App. 81, 274 S.E.2d 164 (1980); *Porter v. Marcus*, 156 Ga. App. 368,

274 S.E.2d 168 (1980); *Walker v. City of Atlanta*, 156 Ga. App. 223, 274 S.E.2d 668 (1980); *Shepherd v. Shepherd*, 247 Ga. 273, 275 S.E.2d 317 (1981); *Hanes v. Hanes*, 247 Ga. 305, 276 S.E.2d 4 (1981); *Chesser v. Chesser*, 247 Ga. 168, 276 S.E.2d 45 (1981); *Hanes v. Hanes*, 247 Ga. 305, 276 S.E.2d 4 (1981); *Tison v. Tison*, 247 Ga. 246, 276 S.E.2d 247 (1981); *Keeter v. State ex rel. Keeter*, 247 Ga. 256, 276 S.E.2d 247 (1981); *Fields v. Fields*, 247 Ga. 437, 276 S.E.2d 614 (1981); *Larson v. Gambrell*, 157 Ga. App. 193, 276 S.E.2d 686 (1981); *Camp v. Camp*, 247 Ga. 533, 277 S.E.2d 55 (1981); *Dunn v. Dunn*, 247 Ga. 327, 277 S.E.2d 241 (1981); *Shepherd v. Epps*, 247 Ga. 545, 277 S.E.2d 686 (1981); *Alday v. Alday*, 247 Ga. 663, 277 S.E.2d 914 (1981); *Levison v. Levison*, 247 Ga. 667, 278 S.E.2d 409 (1981); *Neal v. Washington*, 158 Ga. App. 39, 279 S.E.2d 294 (1981); *Robertson v. Robertson*, 247 Ga. 810, 280 S.E.2d 335 (1981); *Field Developers, Inc. v. City of Atlanta*, 158 Ga. App. 388, 280 S.E.2d 364 (1981); *McCrary v. City of Atlanta*, 158 Ga. App. 406, 280 S.E.2d 906 (1981); *Woodall v. Woodall*, 248 Ga. 172, 281 S.E.2d 619 (1981); *Foy v. Lewis*, 248 Ga. 234, 282 S.E.2d 295 (1981); *Robbins v. Robbins*, 248 Ga. 273, 282 S.E.2d 340 (1981); *Bedingfield v. Bedingfield*, 248 Ga. 147, 282 S.E.2d 641 (1981); *Hunnicut v. Hunnicutt*, 248 Ga. 516, 283 S.E.2d 891 (1981); *Yarbrough v. Yarbrough*, 248 Ga. 282, 283 S.E.2d 898 (1981); *Walsh Constr. Co. v. Frawley*, 248 Ga. 151, 284 S.E.2d 434 (1981); *Keller v. Berger*, 248 Ga. 552, 285 S.E.2d 188 (1981); *Mills v. Pepsi-Cola Bottlers*, 160 Ga. App. 349, 287 S.E.2d 41 (1981); *Southwire Co. v. Sweet*, 160 Ga. App. 625, 287 S.E.2d 635 (1981); *Tallman v. Tallman*, 161 Ga. App. 447, 287 S.E.2d 703 (1982); *Farmer v. Union County Dep't of Family & Children Servs.*, 162 Ga. App. 66, 290 S.E.2d 163 (1982); *Zamora v. Coffee Gen. Hosp.*, 162 Ga. App. 82, 290 S.E.2d 192 (1982); *DeLoach v. DeLoach*, 162 Ga. App. 185, 290 S.E.2d 292 (1982); *Gordin v. Gordin*, 249 Ga. 371, 290 S.E.2d 921 (1982); *Prentice v. Prentice*, 249 Ga. 27, 291 S.E.2d 553 (1982); *Wigley v. Nance*, 163 Ga. App. 185, 293 S.E.2d 369 (1982); *Moon v. Habersham County Dep't of Family & Children Servs.*, 162 Ga. App. 694, 293 S.E.2d 402 (1982); *Sutton v. Burousas*, 164 Ga. App. 553, 293 S.E.2d 566 (1982); *Fender v. Fender*, 249 Ga.

773, 294 S.E.2d 474 (1982); Chattooga County v. Bruce, 163 Ga. App. 478, 294 S.E.2d 712 (1982); Young v. Hinton, 163 Ga. App. 692, 295 S.E.2d 150 (1982); Webster v. Webster, 250 Ga. 57, 295 S.E.2d 828 (1982); McCannon v. City of Atlanta, 163 Ga. App. 844, 296 S.E.2d 363 (1982); Steele v. Steele, 250 Ga. 101, 296 S.E.2d 570 (1982); Geron v. Calibre Cos., 250 Ga. 213, 296 S.E.2d 602 (1982); Wiggins v. City of Millen, 165 Ga. App. 18, 299 S.E.2d 191 (1983); Johnson v. Smith, 164 Ga. App. 611, 299 S.E.2d 387 (1982); Johnson v. Smith, 251 Ga. 1, 302 S.E.2d 542 (1983); Buckholts v. Buckholts, 251 Ga. 58, 302 S.E.2d 676 (1983); Wren v. Harrison, 165 Ga. App. 847, 303 S.E.2d 67 (1983); In re M.K.C., 166 Ga. App. 261, 304 S.E.2d 430 (1983); In re M.R., 166 Ga. App. 360, 304 S.E.2d 736 (1983); In re M.G., 167 Ga. App. 38, 306 S.E.2d 40 (1983); Fowler v. City of East Point, 166 Ga. App. 872, 306 S.E.2d 431 (1983); Beckman v. Black, 170 Ga. App. 193, 316 S.E.2d 784 (1984); Stanley v. Stanley, 172 Ga. App. 85, 322 S.E.2d 97 (1984); American Druggists' Ins. Co. v. Harris, 253 Ga. 535, 322 S.E.2d 496 (1984); In re J.M.B., 172 Ga. App. 371, 324 S.E.2d 213 (1984); Holbrook v. State, 173 Ga. App. 251, 326 S.E.2d 240 (1985); Voight v. Orr, 173 Ga. App. 248, 326 S.E.2d 480 (1985); Williamson v. Department of Pub. Safety, 173 Ga. App. 249, 326 S.E.2d 480 (1985); Hall v. Jenkins, 173 Ga. App. 710, 327 S.E.2d 831 (1985); Farlar v. State, 173 Ga. App. 622, 328 S.E.2d 436 (1985); Kingery Block & Concrete Co. v. Luttrell, 174 Ga. App. 481, 330 S.E.2d 181 (1985); Feagin v. Feagin, 174 Ga. App. 474, 330 S.E.2d 410 (1985); McCrary v. State, 174 Ga. App. 492, 330 S.E.2d 429 (1985); Bright v. DeKalb County, 174 Ga. App. 662, 331 S.E.2d 58 (1985); Law Offices of Johnson & Robinson v. Fortson, 175 Ga. App. 706, 334 S.E.2d 33 (1985); Bennett v. Barrett, 175 Ga. App. 695, 334 S.E.2d 44 (1985); Simpkins v. Minks, 175 Ga. App. 729, 334 S.E.2d 340 (1985); In re W.S.G., 175 Ga. App. 883, 334 S.E.2d 739 (1985); Jaraysi v. Southern Bell Tel. & Tel. Co., 176 Ga. App. 105, 335 S.E.2d 463 (1985); Nixon v. A.F.M., Inc., 176 Ga. App. 546, 336 S.E.2d 382 (1985); Baety v. Eisenstein, 176 Ga. App. 612, 336 S.E.2d 849 (1985); Sloan v. Brooks, 176 Ga. App. 872, 338 S.E.2d 299 (1985); Pritchett v. Anding, 177 Ga. App. 34, 338 S.E.2d 503 (1985); Henderson v. Smith, 177 Ga. App. 89, 338

S.E.2d 520 (1985); Milner v. Milner, 177 Ga. App. 164, 338 S.E.2d 757 (1985); Noggle v. Arnold, 177 Ga. App. 119, 338 S.E.2d 763 (1985); Harper v. Evans, 177 Ga. App. 303, 339 S.E.2d 265 (1985); Murdock v. Bank of Am. Nat'l Trust & Sav. Ass'n, 177 Ga. App. 409, 339 S.E.2d 392 (1985); Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986); Folks, Inc. v. Agan, 177 Ga. App. 480, 340 S.E.2d 26 (1986); Elmore v. Elmore, 177 Ga. App. 682, 340 S.E.2d 651 (1986); Dogwood Square Nursing Ctr., Inc. v. State Health Planning Agency, 255 Ga. 694, 341 S.E.2d 432 (1986); Parham v. Lanier Collection Agency & Serv., Inc., 178 Ga. App. 84, 341 S.E.2d 889 (1986); Colwell v. Voyager Cas. Ins. Co., 178 Ga. App. 42, 342 S.E.2d 7 (1986); Nazerian v. City of McCaysville, 178 Ga. App. 27, 342 S.E.2d 11 (1986); Klobe v. Montgomery Ward & Co., 178 Ga. App. 164, 342 S.E.2d 496 (1986); Mitchell v. Purser, 178 Ga. App. 267, 342 S.E.2d 753 (1986); Gazaway v. State, 178 Ga. App. 318, 343 S.E.2d 135 (1986); New v. Wilkins, 178 Ga. App. 337, 343 S.E.2d 136 (1986); Sidwell v. Wheeler, 178 Ga. App. 732, 344 S.E.2d 527 (1986); Vikowsky v. Savannah Appliance Serv. Corp., 179 Ga. App. 135, 345 S.E.2d 621 (1986); Jones Roofing & Constr. Co. v. Roberts, 179 Ga. App. 169, 345 S.E.2d 683 (1986); Doby v. State, 179 Ga. App. 285, 346 S.E.2d 89 (1986); Walker v. State, 179 Ga. App. 690, 347 S.E.2d 307 (1986); Howell v. Howell, 179 Ga. App. 612, 347 S.E.2d 361 (1986); In re R.L.Y., 180 Ga. App. 559, 349 S.E.2d 800 (1986); Rich v. McDonald Car & Truck Leasing, Inc., 180 Ga. App. 613, 349 S.E.2d 832 (1986); Carrigan v. City of Atlanta, 180 Ga. App. 741, 350 S.E.2d 482 (1986); Castor v. DeKalb County, 180 Ga. App. 772, 350 S.E.2d 487 (1986); McDonald v. State, 180 Ga. App. 713, 350 S.E.2d 581 (1986); Cullen v. Bragg, 180 Ga. App. 866, 350 S.E.2d 798 (1986); Jones v. Jones, 181 Ga. App. 276, 351 S.E.2d 691 (1986); Preferred Risk Mut. Ins. Co. v. Laube, 181 Ga. App. 579, 353 S.E.2d 203 (1987); AAA Van Servs., Inc. v. Willis, 182 Ga. App. 46, 354 S.E.2d 631 (1987); Hamrick v. Bonner, 182 Ga. App. 76, 354 S.E.2d 687 (1987); Roach v. Roach, 182 Ga. App. 122, 354 S.E.2d 877 (1987); Bonner v. State, 182 Ga. App. 133, 355 S.E.2d 91 (1987); Lewis v. Sun Mgt., Inc., 182 Ga. App. 560, 356 S.E.2d 526 (1987); Williams v. Aetna Cas. & Sur. Co., 182 Ga.

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App. 684, 356 S.E.2d 690 (1987); Davis v. State, 182 Ga. App. 736, 356 S.E.2d 762 (1987); Goodwin v. Richmond, 182 Ga. App. 745, 356 S.E.2d 888 (1987); Ganjizadeh v. Brown, 182 Ga. App. 807, 357 S.E.2d 154 (1987); Henderson v. Mrs. Smith's Frozen Foods, 182 Ga. App. 829, 357 S.E.2d 271 (1987); Honester v. Tinsley, 183 Ga. App. 146, 358 S.E.2d 295 (1987); Denney v. Shield Ins. Co., 183 Ga. App. 280, 358 S.E.2d 628 (1987); Williams v. Kaminsky, 183 Ga. App. 283, 358 S.E.2d 667 (1987); Byrd v. Byrd, 183 Ga. App. 302, 359 S.E.2d 2 (1987); Leonard v. Easley, 183 Ga. App. 579, 359 S.E.2d 443 (1987); Georgia Am. Ins. Co. v. Mills, 183 Ga. App. 707, 359 S.E.2d 697 (1987); Vaughn v. Cable E. Point, Inc., 185 Ga. App. 203, 363 S.E.2d 639 (1987); Nova Group, Inc. v. M.B. Davis Elec. Co., 258 Ga. 7, 364 S.E.2d 833 (1988); Crolley v. Johnson, 185 Ga. App. 671, 365 S.E.2d 277 (1988); Tanner v. Davis, 185 Ga. App. 711, 365 S.E.2d 871 (1988); Shelton v. Ervin, 185 Ga. App. 712, 365 S.E.2d 873 (1988); Graves v. Graves, 186 Ga. App. 140, 366 S.E.2d 809 (1988); Jones v. Padgett, 186 Ga. App. 362, 367 S.E.2d 88 (1988); State v. Baldwin, 187 Ga. App. 611, 371 S.E.2d 135 (1988); State Farm Mut. Auto. Ins. Co. v. Yancey, 188 Ga. App. 8, 371 S.E.2d 883 (1988); Self v. City of Atlanta, 188 Ga. App. 81, 372 S.E.2d 283 (1988); Lloyd v. State, 258 Ga. 645, 373 S.E.2d 1 (1988); Bishop v. Typo-Repro Servs., Inc., 188 Ga. App. 581, 373 S.E.2d 762 (1988); Patrick v. Glass, 188 Ga. App. 737, 374 S.E.2d 229 (1988); Fellman v. State, 189 Ga. App. 203, 375 S.E.2d 476 (1988); McCrary v. Department of Human Resources, 191 Ga. App. 299, 381 S.E.2d 438 (1989); Ponder v. State, 191 Ga. App. 503, 382 S.E.2d 204 (1989); Scott v. McLaughlin, 192 Ga. App. 230, 384 S.E.2d 212 (1989); McCracken v. City of College Park, 259 Ga. 490, 384 S.E.2d 648 (1989); McClure v. Gower, 259 Ga. 678, 385 S.E.2d 271 (1989); Mobley v. State, 192 Ga. App. 719, 386 S.E.2d 384 (1989); Parker v. Bellamy-Lunda-Dawson, 192 Ga. App. 764, 386 S.E.2d 527 (1989); Hardwick v. Barnes, 193 Ga. App. 127, 386 S.E.2d 927 (1989); Smathers v. City of Lawrenceville Hous. Auth., 193 Ga. App. 94, 387 S.E.2d 6 (1989); Georgia Water Resources, Inc. v. Commissioner of Labor, 193 Ga. App. 252, 387

S.E.2d 374 (1989); Wiley v. Tanner, 193 Ga. App. 477, 388 S.E.2d 70 (1989); Jarallah v. Pickett Suite Hotel, 193 Ga. App. 325, 388 S.E.2d 333 (1989); Anderson v. State, 193 Ga. App. 540, 388 S.E.2d 351 (1989); North Ga. Home Constr. Co. v. Lackey, 193 Ga. App. 346, 388 S.E.2d 766 (1989); Mack v. Third Bedford-Pines Apt., Ltd., 193 Ga. App. 838, 389 S.E.2d 405 (1989); McSmith v. Marshall, 194 Ga. App. 331, 390 S.E.2d 126 (1990); Saben Appliances v. Waller, 194 Ga. App. 286, 390 S.E.2d 431 (1990); Human v. State, 194 Ga. App. 355, 390 S.E.2d 446 (1990); Oran v. Canada Life Assurance Co., 194 Ga. App. 518, 390 S.E.2d 879 (1990); Barton v. Anthony, 194 Ga. App. 500, 391 S.E.2d 25 (1990); Griffin v. State, 194 Ga. App. 624, 391 S.E.2d 675 (1990); Ko v. Habersham Fed. Sav. Bank, 194 Ga. App. 769, 391 S.E.2d 723 (1990); Alstrom v. Allstate Enters., Inc., 195 Ga. App. 458, 394 S.E.2d 801 (1990); Lee v. Britt, 196 Ga. App. 152, 395 S.E.2d 347 (1990); Ogeechee Steel, Inc. v. City of Atlanta, 196 Ga. App. 84, 396 S.E.2d 609 (1990); Jim Walter Homes, Inc. v. Roberts, 196 Ga. App. 618, 396 S.E.2d 787 (1990); Weaver v. Jones, 260 Ga. 493, 396 S.E.2d 890 (1990); Service Truck Brokers v. Kellco Transp., Inc., 196 Ga. App. 702, 397 S.E.2d 53 (1990); In re N.A.B., 196 Ga. App. 819, 397 S.E.2d 301 (1990); Joyner v. Joyner, 197 Ga. App. 304, 398 S.E.2d 294 (1990); Marshall v. Gatison, 197 Ga. App. 370, 398 S.E.2d 429 (1990); Jones v. McCoy, 197 Ga. App. 430, 398 S.E.2d 786 (1990); Akins v. Life Investors Ins. Co. of Am., 197 Ga. App. 574, 399 S.E.2d 584 (1990); Crymes v. Smith, 260 Ga. 730, 401 S.E.2d 11 (1990); Faircloth v. Greiner, 260 Ga. 682, 401 S.E.2d 11 (1990); Lane v. Taylor, 199 Ga. App. 470, 405 S.E.2d 324 (1991); Farmer v. State, 199 Ga. App. 576, 405 S.E.2d 569 (1991); Miller v. Merck & Co., 199 Ga. App. 722, 405 S.E.2d 761 (1991); Citation Bonding Co. v. State, 199 Ga. App. 868, 406 S.E.2d 289 (1991); Offutt v. Earp, 200 Ga. App. 74, 406 S.E.2d 571 (1991); Scott v. State, 200 Ga. App. 481, 408 S.E.2d 495 (1991); Robenolt v. Chrysler Fin. Servs. Corp., 201 Ga. App. 168, 410 S.E.2d 365 (1991); Sartin v. State, 201 Ga. App. 612, 411 S.E.2d 582 (1991); Wieland v. Wieland, 202 Ga. App. 222, 414 S.E.2d 247 (1991); Olin Corp. v. Collins, 261 Ga. 849, 413 S.E.2d 193 (1992); Heuer Indus., Inc. v. Crum, 202 Ga. App. 675, 415 S.E.2d 307

(1992); *Moultrie Ins. Agency, Inc. v. Goodbar*, 203 Ga. App. 677, 417 S.E.2d 658 (1992); *Walls v. State*, 204 Ga. App. 348, 419 S.E.2d 344 (1992); *Snow's Farming Enters., Inc. v. Carver State Bank*, 206 Ga. App. 661, 426 S.E.2d 158 (1992); *Denton v. Hogge*, 208 Ga. App. 734, 431 S.E.2d 728 (1993); *C.W. Matthews Contracting Co. v. Collins*, 210 Ga. App. 1, 435 S.E.2d 221 (1993); *Brownlee v. City of Atlanta*, 212 Ga. App. 174, 441 S.E.2d 492 (1994); *Kleber v. Cobb County*, 212 Ga. App. 441, 442 S.E.2d 296 (1994); *Crowder v. Citizens Trust Bank*, 213 Ga. App. 477, 444 S.E.2d 853 (1994); *Madan v. Damiano*, 213 Ga. App. 736, 445 S.E.2d 831 (1994).

Application

1. In General

An appeal from the denial of an extraordinary motion for new trial is separate from any original appeal, and must be made by application. *Turner v. Binswanger*, 203 Ga. App. 319, 417 S.E.2d 221 (1992).

Appeals from the denial of extraordinary motions for new trial, when separate from an original direct appeal, are subject to the discretionary appeal procedure of this section. *Hooks v. State*, 210 Ga. App. 171, 435 S.E.2d 617 (1993).

Appeal from post-judgment award. — A party aggrieved by a post-judgment § 9-15-14 award is required to comply with the discretionary appeal procedure of paragraph (a)(10) only in those instances where no direct appeal has been otherwise taken from the underlying judgment. However, in those instances where a direct appeal has been taken from the underlying judgment, a party may also appeal directly from the § 9-15-14 post-judgment award without regard to the discretionary appeal procedures of paragraph (a)(10). *Rolleston v. Huie*, 198 Ga. App. 49, 400 S.E.2d 349 (1990), cert. denied, 198 Ga. App. 898, 400 S.E.2d 349 (1991).

Agency decision denying request to expunge criminal records. — Appeal of a superior court decision reviewing a decision of an agency denying a request to expunge criminal records requires the discretionary appeal procedures of this section. *Strohecker v. Gwinnett County Police Dep't*, 182 Ga. App. 853, 357 S.E.2d 305 (1987).

Appeals from decisions of superior courts reviewing decision of state and local admin-

istrative agencies must be by application pursuant to this section; the words "by certiorari or de novo proceedings" in paragraph (a)(1) relate only to the category "lower courts" and not to the category "state and local administrative agencies"; since no application for appeal was made from the superior court's order affirming the decision of the administrative law judge of the Department of Natural Resources, the appellate court was without jurisdiction to entertain it. *St. Simons Island Save the Beach Ass'n. v. Glynn County Bd. of Comm'rs.*, 205 Ga. App. 428, 422 S.E.2d 258 (1992).

Zoning cases. — The court was without jurisdiction to hear the appeal of a zoning case since appellants failed to file an application as required by *Trend Dev. Corp. v. Douglas County*, 259 Ga. 425, 383 S.E.2d 123 (1989). *Pruitt v. Fulton County*, 210 Ga. App. 873, 437 S.E.2d 861 (1993).

Dismissal of appeal reviewing zoning tribunal decision. — Paragraph (a)(1) is applicable to appeals from a decision of a superior court reviewing a decision of a local zoning tribunal where the superior court dismissed the appeal based on the appellants' failure to serve the appellee with a copy of the petition in a timely manner. *Ross v. Mullis Tree Serv., Inc.*, 183 Ga. App. 627, 360 S.E.2d 288 (1987).

A revenue department assessment is a decision of a state administrative agency within the meaning of paragraph (a)(1), and an application must be filed. *Miles v. Collins*, 259 Ga. 536, 384 S.E.2d 630 (1989).

Appeal from probate court to superior court. — Under the plain language of this Code section, no application for appeal is required for decisions of superior courts reviewing judgments of the probate courts. The statute mandates that a direct appeal is available from the superior court affirmation of a probate court case. *Phillips v. State*, 261 Ga. 190, 402 S.E.2d 737 (1991).

Appeal from board of commissioners. — An appeal from the final order of a superior court making the action of a board of commissioners of a county, which had voted to discharge the Chief Tax Assessor for the county, the judgment of the court was entertained on its merits. *Parsons v. Chatham County Bd. of Comm'rs*, 204 Ga. App. 130, 418 S.E.2d 459 (1992).

Application (Cont'd)**1. In General (Cont'd)**

Paragraph (a)(7) applicable to criminal cases. — The 1984 amendment requiring applications to appeal orders denying extraordinary motions for new trial applies to criminal cases as well as civil cases. *Pitts v. State*, 254 Ga. 298, 328 S.E.2d 732 (1985).

Trial court has no authority to grant an extension of time for filing an application for discretionary appeal. *Rosenstein v. Jenkins*, 166 Ga. App. 385, 304 S.E.2d 740 (1983).

Appeal dismissed where no application. — Appeal from judgment for costs entered in an action for damages in the amount of \$1,951.00 must be dismissed where the discretion of the Court of Appeals is not invoked by application. *Gardner v. Villa Monte Homes, Inc.*, 173 Ga. App. 896, 328 S.E.2d 565 (1985).

Failure to file an application for a discretionary appeal pursuant to paragraph (a)(7) of this section leaves the appellate court without jurisdiction over a direct appeal. *Ibietatorremendia v. State*, 174 Ga. App. 786, 332 S.E.2d 20 (1985).

An application is required to appeal a domestic relations case in which a "judgment" or an "order" has been entered. Any party who seeks to appeal a "judgment" or an "order" entered in a domestic relations case must follow the procedure set out in subsection (a)(2) of this Code section. *Horton v. Kitchens*, 259 Ga. 446, 383 S.E.2d 871 (1989).

Failure to file application to appeal results in dismissal of appeal in domestic relations cases. *Bedford v. Bedford*, 246 Ga. 780, 273 S.E.2d 167 (1980).

Child support. — In an action for repayment of child support expended by the Department of Human Resources, the failure to file an application for appeal required under paragraph (a)(2) did not result in dismissal of the appeal. An action for repayment under § 19-11-5 is one for collection of a debt and requires discretionary appeal procedures only where the judgment is \$2,500 (now \$10,000.00) or less, pursuant to paragraph (a)(6). *Department of Human Resources v. Johnson*, 175 Ga. App. 610, 333 S.E.2d 845 (1985).

Appeals from orders awarding support for

minor children are domestic relations cases which require compliance with the discretionary appeal procedure of subsection (a)(2). *Jackson v. Roach*, 199 Ga. App. 653, 405 S.E.2d 712, cert. denied, 199 Ga. App. 906, 405 S.E.2d 712 (1991); *Davis v. Welch*, 205 Ga. App. 462, 422 S.E.2d 323 (1992).

Sufficient filing under subsection (d). — Although a notice of appeal must be filed in the court "wherein the case was determined" putting that court on notice that its jurisdiction is affected according to § 5-6-37, there is no such requirement regarding an application, since subsection (d) only requires it to be filed with the clerk of the appellate court. In re A.R.B., 209 Ga. App. 324, 433 S.E.2d 411 (1993).

Effect of failure to file timely application. — In a case governed by the appeal procedures of this section, the trial court has the authority to dismiss the appeal where the appellant fails to file timely an application to appeal. *Tobitt v. Tobitt*, 249 Ga. 245, 290 S.E.2d 49 (1982).

Where no application for review was filed with Court of Appeals within 30 days of lower court's judgment denying claim for unemployment compensation, an attempted direct appeal was a nullity requiring dismissal. *Depass v. Board of Review*, 172 Ga. App. 561, 324 S.E.2d 505 (1984).

Denial of extraordinary motion for new trial. — Subsection (a)(7) of this section does not purport to confer direct appellate jurisdiction to consider the merits of issues that could and should have been raised in a timely motion for new trial, an extraordinary motion for new trial is properly denied and will be affirmed on appeal if the motion raises only issues that could and should have been raised in a timely motion for new trial. *Bohannon v. State*, 203 Ga. App. 783, 417 S.E.2d 679 (1992).

Appeal of denial of motion to set aside arising out of divorce case will be dismissed for failure to comply with this section. *Steele v. Niggelie*, 163 Ga. App. 98, 293 S.E.2d 368 (1982).

This section cannot be construed to expand the jurisdiction of the Court of Appeals over direct orders of lower courts granting or denying motions whose substance and function are to obtain the set-aside of a judgment, including one based upon equitable grounds. *Cain v. Moore*, 207 Ga. App.

726, 429 S.E.2d 135 (1993).

Appeal from summary judgment grant improperly denied. — See *Brown v. Rutledge*, 263 Ga. 474, 435 S.E.2d 187 (1993).

Appeal from legitimization proceeding is required to be made by application to the appropriate appellate court, rather than by direct appeal. *Brown v. Williams*, 174 Ga. App. 604, 332 S.E.2d 48 (1985).

A legitimization proceeding is a type of domestic relations case, and an application for permission to appeal must be made in accordance with paragraph (a)(2). *Hill v. Adams*, 182 Ga. App. 848, 357 S.E.2d 300 (1987).

Action for equitable partition to enforce separation agreement. — Although it had its roots in the parties' divorce action, an action for an equitable partition to enforce the separation agreement which was part of the divorce decree is a new action and not merely a continuation of the divorce action. For this reason, this section does not apply to this situation, and husband's direct appeal from the partition order is proper. *Larimer v. Larimer*, 249 Ga. 500, 292 S.E.2d 71 (1982).

Failure to file notice of appeal within time required by subsection (g). — Notice of appeal is subject to dismissal if appellant fails to file said notice within ten days after an order is issued granting an application for such appeal. *Caldwell v. Elbert County School Dist.*, 247 Ga. 359, 276 S.E.2d 43 (1981).

Subsection (g), read in conjunction with § 5-6-48(b)(1), requires that notice of appeal from judgment in contempt of alimony judgment shall be dismissed if appellant fails to file said notice within ten days after order is issued granting application for such appeal. *Harris v. Harris*, 245 Ga. 75, 263 S.E.2d 113 (1980).

Applicability of section to judgment on auditor's report in equity case. — Where an auditor is appointed in an equity case and renders a report which contains findings of fact and conclusions of law which are approved by the trial court, judgment entered on such report or summary judgment entered in case where there are no genuine issues as to material facts set forth in the report is subject to the application requirement of this section. *Citizens & S. Nat'l Bank v. Rayle*, 246 Ga. 727, 273 S.E.2d 139 (1980).

Where an auditor is appointed in an equity case and renders a report which contains findings of fact and conclusions of law which are approved by the trial court, a judgment rendered on such report is subject to the application requirement of this section. *Ravan v. Stephens*, 248 Ga. 289, 282 S.E.2d 312 (1981).

Notice of appeal from judgment of contempt must meet time requirement of subsection (g). — Notice of appeal from judgment of contempt regarding a domestic relations decree is subject to dismissal if appellant fails to file said notice within ten days after order is issued granting application for such appeal. *Walters v. Walters*, 245 Ga. 695, 266 S.E.2d 507 (1980).

Action seeking to vacate judgment for contempt. — Where court entered an order adjudicating former spouse in contempt, and after time for appealing the contempt order had expired, former spouse brought action seeking to vacate and set aside the judgment for contempt on ground that judgment in the divorce case was void, for legal purposes this was the same as an appeal from the order holding appellant in contempt. Failure to file an application to appeal pursuant to subsection (b) made dismissal proper. *Chandler v. Cochran*, 247 Ga. 171, 275 S.E.2d 657 (1981).

Denial of application to appeal nonfinal order is not res judicata. — Denial of application to appeal nonfinal order is perhaps persuasive but is not res judicata in appellate court when later reviewing final order in same case. *Citizens & S. Nat'l Bank v. Rayle*, 246 Ga. 727, 273 S.E.2d 139 (1980).

Appeal from decision to terminate city employee. — The Court of Appeals is without jurisdiction to entertain a direct appeal from a decision of a city manager approving the termination of a city employee. *Salter v. City of Thomaston*, 200 Ga. App. 536, 409 S.E.2d 88 (1991).

Dismissal for appealing review of administrative decision under general appeals statute. — Where taxpayer did not file application for discretionary appeal from decision of superior court reviewing decision of Department of Revenue, but chose to appeal directly to Supreme Court pursuant to § 5-6-34(a), such appeal was dismissed for failure to comply with procedure for appeal from decisions of administrative agencies

Application (Cont'd)**1. In General (Cont'd)**

required by this section. *Plantation Pipe Line Co. v. Strickland*, 249 Ga. 829, 294 S.E.2d 471 (1982).

Appeal from small claims court not brought under paragraph (a)(1). — Where plaintiff commenced a dispossessory proceeding against defendant in the Small Claims Court of Putnam County and received a dispossessory warrant against defendant, who appealed to the Superior Court of Putnam County where a jury found for defendant, and plaintiff appealed to the Court of Appeals and defendant cross-appealed, where the appeal was not brought under paragraph (a)(1) of this section, the appeal and cross-appeal will be dismissed. *Manley v. Williams*, 166 Ga. App. 298, 304 S.E.2d 468 (1983).

Where appeal deals with dismissal of garnishment proceeding for delinquent payments under divorce decree directing payment on installment notes and the divorce is only incidental thereto, a motion to dismiss the appeal for failure to file an application for appeal will be denied. *Kile v. Kile*, 165 Ga. App. 321, 301 S.E.2d 289 (1983).

Appeal arising out of superior court's dismissal of appeal from judgment by recorder's court should be brought under the provision pertaining to discretionary appeals and the failure to do so subjects it to dismissal. *Wimbish v. State*, 166 Ga. App. 223, 303 S.E.2d 766 (1983).

No direct appeal from recorder's court to Supreme Court. — A direct appeal from the recorder's court to the Supreme Court was not available in a case challenging the constitutionality of an ordinance. Instead, the proper method of review was by certiorari to the superior court. *Russell v. City of East Point*, 261 Ga. 213, 403 S.E.2d 50, cert. denied, U.S. , 112 S. Ct. 448, 116 L. Ed. 2d 466 (1991).

Dismissal of appeal of final judgment is res judicata. — Dismissal by Supreme Court of direct appeal for lack of application as required by this section invokes doctrine of res judicata when judgment appealed was final and on merits. *Byrd v. Byrd*, 248 Ga. 163, 281 S.E.2d 617 (1981).

Denial of discretionary appeal under this section by Supreme Court invokes doctrine

of res judicata when judgment appealed was final and on the merits. *Steele v. Niggelie*, 163 Ga. App. 98, 293 S.E.2d 368 (1982).

Appeal from decision as to State Board of Education's administrative decision. —

Where the affirmance of the local board of education by the State Board of Education is a decision of a state administrative agency acting in a quasi-judicial capacity and the order of the superior court is itself an appellate decision, reviewing the decision of the state board, the appeal is from a decision of a superior court reviewing a decision of a state administrative agency, within the meaning of this section. Accordingly, failure to obtain an order of the Court of Appeals permitting the filing of such an appeal must result in its dismissal. *Hogan v. Taylor County Bd. of Educ.*, 157 Ga. App. 680, 278 S.E.2d 106 (1981).

Appeal of lower court's review of agency decision. — The requirements of this section must be followed as a necessary prerequisite to secure discretionary appellate review of decisions of superior courts reviewing decisions of state administrative agencies. *Heiny v. Department of Pub. Safety*, 169 Ga. App. 37, 311 S.E.2d 848 (1983).

Appeals from decisions of superior courts reviewing decisions of state and local administrative agencies shall be by application in nature of a petition, enumerating errors to be urged on appeal and stating why appellate court has jurisdiction. *Wheeler v. Strickland*, 248 Ga. 85, 281 S.E.2d 556 (1981); *City of Atlanta Bd. of Zoning Adjustment v. Midtown N., Ltd.*, 257 Ga. 496, 360 S.E.2d 569 (1987).

Superior courts have authority and responsibility in workers' compensation cases.

— Under this section, the superior courts have all of the authority and all of the responsibilities which the appellate courts formerly had in workers' compensation cases. *Southeastern Aluminum Recycling, Inc. v. Rayburn*, 251 Ga. 365, 306 S.E.2d 240 (1983).

Cross-appeal to appealable order. — An appeal which, standing alone, would be subject to discretionary appeal procedures, is appealable as a matter of right if it is classifiable as a cross-appeal to an appealable order. *Buschel v. Kysor/Warren*, 213 Ga. App. 91, 444 S.E.2d 105 (1994).

Cross appeal in workers' compensation case. — In a workers' compensation case, even though no application was made by the employer as required by this section, since claimant had taken direct appeal, the employer's cross appeal could be filed also. *Linder v. Alterman Foods, Inc.*, 162 Ga. App. 786, 292 S.E.2d 900 (1982).

Administrative agency decision. — To conclude that, following review by the superior court, a decision of the administrator of the Office of Consumer Affairs to issue an investigative demand is appealable as a matter of right, but the administrator's decision on the merits is appealable only by application would be contrary to the clear purpose of this section. The agency's decision to issue an investigative demand is a "decision" of an administrative agency within the meaning of subsection (a) of this section and an appeal from a grant of summary judgment by the superior court to the administrator should be dismissed for failure to comply with the requirements of this section. *Tri-State Bldg. & Supply, Inc. v. Reid*, 251 Ga. 38, 302 S.E.2d 566 (1983).

Atlanta Bureau of Zoning Adjustment is "local administrative agency" within meaning of paragraph (a)(1), thereby requiring discretionary-appeal applications from decisions of the superior court reviewing decisions of the Bureau of Zoning Adjustment. *Rybert & Co. v. City of Atlanta*, 258 Ga. 347, 368 S.E.2d 739 (1988), overruled on other grounds, *Southern States Landfill, Inc. v. City of Atlanta Bd. of Zoning Adjustments*, 261 Ga. 759, 410 S.E.2d 721 (1991).

Appeal of court order affirming denial of unemployment compensation claim. — Where the appellant files a direct appeal from a superior court order affirming the Department of Labor's denial of her claim for unemployment compensation without first obtaining an order from the appellate court granting permission for such an appeal pursuant to paragraph (a)(1) of this section, the appeal will be dismissed. *Cook v. Caldwell*, 166 Ga. App. 452, 305 S.E.2d 187 (1983).

Appeal from State Personnel Board as to termination of state employee. — A direct appeal from an order affirming a decision of the State Personnel Board which reversed the termination of appellee's employment as a correctional officer which was not brought

under the discretionary appeal provisions of this section must be dismissed for lack of jurisdiction. *Department of Offender Rehabilitation v. Meeks*, 165 Ga. App. 269, 299 S.E.2d 757 (1983).

An appeal from an order of a superior court affirming a decision of the State Personnel Board which denies an appeal from the sustaining of a dismissal from employment as a correctional officer by a hearing officer must be brought under the discretionary provisions of this section. Where that procedure is not followed, the Court of Appeals has no jurisdiction over the appeal and, accordingly, it must be dismissed. *Summerset v. Department of Offender Rehabilitation*, 167 Ga. App. 730, 307 S.E.2d 678 (1983).

Appeals of an action, labeled "tort-negligence," which a state prisoner, brought against officials of a correctional institute, were not dismissed under subdivision (a)(1) of this section because defendant filed separate tort actions seeking damages for official actions which could have been the subject of administrative grievances. *McBride v. Zant*, 204 Ga. App. 183, 418 S.E.2d 781 (1992).

Appeal of finding of contempt. — A finding of wilful contempt of a court order entering judgment on a jury verdict not dealing with alimony or child custody is directly appealable notwithstanding the denial of a simultaneously filed application for discretionary appeal. *Stephens v. Stephens*, 184 Ga. App. 538, 362 S.E.2d 118 (1987).

Denial of motions to stay or discharge contempt confinement. — Since a contempt order itself cannot be appealed directly, neither the denial of a motion to stay incarceration for contempt nor the denial of a motion for discharge from confinement can be appealed directly. The procedure for taking such appeals, if allowable at all, is governed by this section. *Strickland v. Strickland*, 252 Ga. 218, 312 S.E.2d 606 (1984).

Review of order regarding termination of liquor-wholesaling relationship. — The matter before the state revenue commissioner (the proposed termination by a liquor producer of four of its designated wholesalers) was a "contested case" within the meaning of the Administrative Procedure Act, not involving the suspension or cancellation of

Application (Cont'd)**1. In General (Cont'd)**

licenses, and the trial court was thus correct in treating the review of the commissioner's order denying the proposal as a petition for judicial review pursuant to the APA; there having been no application to appeal the decision of the superior court affirming the commissioner's order, as required by § 5-6-35, the motion to dismiss the appeal was granted. *Schieffelin & Co. v. Strickland*, 253 Ga. 385, 320 S.E.2d 358 (1984).

Appeals of awards of attorney's fees or expenses of litigation. — Effective July 1, 1986, applications to appeal awards of attorney's fees or expenses of litigation under § 9-15-14 are required, and a direct appeal will be dismissed for failure to comply with this statute. *Martin v. Outz*, 257 Ga. 211, 357 S.E.2d 91 (1987).

Where the appellee city sought to dismiss the appellant's appeal from the award of attorney fees because the appellant did not file an application as required by subsection (a)(10) of this Code section for an appeal from an award of attorney fees pursuant to § 9-15-14, an application was not necessary to appeal the award of attorney fees, since this was appealed along with other matters directly appealable. *Stancil v. Gwinnett County*, 259 Ga. 507, 384 S.E.2d 666 (1989).

Appeal that is created by Code Section 40-13-28 (traffic offenses) is "de novo proceeding," whereby the superior court reviews the certified record below and makes a new determination as to guilt or innocence. An appeal to the Court of Appeals must comply with the discretionary appeal provisions of this section. *Anderson v. City of Alpharetta*, 187 Ga. App. 148, 369 S.E.2d 521 (1988).

Appeal from an order denying a motion to recuse requires an application for interlocutory review. *In re Booker*, 186 Ga. App. 614, 367 S.E.2d 850 (1988).

Motion to amend motion for new trial. — Where the original motion for a new trial, as amended, had been denied and was no longer before the trial court, the motion to amend the motion for a new trial was in reality an extraordinary motion for new trial and appeal from the denial of such a motion must be by application when separate from the original appeal. *Martin v. State*, 185 Ga.

App. 145, 363 S.E.2d 765 (1987).

Traffic appeals. — Construing paragraph (a)(1) and § 40-13-28 according to their real intent and meaning and not so strictly as to defeat the legislative purpose, the General Assembly did not intend to remove traffic appeals under § 40-13-28 from the discretionary appeals procedures. *Brown v. City of Marietta*, 214 Ga. App. 840, 449 S.E.2d 540 (1994).

All appeals from judgments of superior courts in traffic cases under § 40-13-28 must follow the procedures in subsection (a) of this section. Accordingly, 30 days after the date this decision is published in the official advance sheets any direct appeals in these cases filed under § 5-6-34(a) will be dismissed. *Brown v. City of Marietta*, 214 Ga. App. 840, 449 S.E.2d 540 (1994).

2. Judgments Concerning Child Custody

Child custody orders include those entered as part of divorce case or pursuant to Art. 3, Ch. 9, T. 19 (Uniform Child Custody Jurisdiction Act) or Art. 2, Ch. 9, T. 19 (Georgia Child Custody Intrastate Jurisdiction Act). *Bryant v. Wigley*, 246 Ga. 155, 269 S.E.2d 418 (1980), overruled on other grounds, 247 Ga. 487, 277 S.E.2d 247 (1981).

Cases involving termination of parental rights must be made by direct appeal as they are not within the purview of paragraph (a)(2) requiring certain appeals to be made by discretionary application. *In re S.N.S.*, 182 Ga. App. 803, 357 S.E.2d 127 (1987).

Appeal from an adoption proceeding was not an appeal from a child custody proceeding, which would require the discretionary appeal procedure. *Moore v. Butler*, 192 Ga. App. 882, 386 S.E.2d 678 (1989).

Failure to file pursuant to section. — Appeals from orders dealing with child custody which are not filed pursuant to this section must be dismissed for lack of jurisdiction. *Hamilton v. Deutscher*, 201 Ga. App. 883, 412 S.E.2d 875 (1991); *In re A.M.D.*, 212 Ga. App. 291, 444 S.E.2d 166 (1994).

Habeas corpus order returning child to lawful custodian is not an order "awarding child custody" within meaning of section. *Bryant v. Wigley*, 246 Ga. 155, 269 S.E.2d 418 (1980), overruled on other grounds, 247 Ga. 487, 277 S.E.2d 247 (1981).

Notice of appeal from judgment granting child custody must meet time requirement of subsection (g). — Subsection (g) of this section read in conjunction with § 5-6-48(b)(1), provides that notice of appeal from judgment granting child custody is subject to dismissal if appellant fails to file said notice within ten days after order is issued granting application for such appeal. *Evans v. Davey*, 154 Ga. App. 269, 267 S.E.2d 875 (1980).

Supreme Court jurisdiction over appeals involving child custody requires underlying judgment for divorce. — Supreme Court does not have jurisdictional basis for entertaining appeals involving child custody questions unless appeal also involved judgment for divorce; all other child custody cases are, accordingly, within jurisdiction of Court of Appeals. *Evans v. Davey*, 154 Ga. App. 269, 267 S.E.2d 875 (1980).

Inapplicable to child custody habeas corpus actions. — The General Assembly did not intend to include child custody habeas corpus actions brought by the custodial parent within the classes of cases enumerated in this section. *Wright v. Hanson*, 248 Ga. 523, 283 S.E.2d 882 (1981), decided prior to 1984 amendment.

An application for appeal in accordance with the procedures set forth in this section is not necessary in child custody habeas corpus proceedings brought by the custodial parent, whether the custodial parent prevails or loses in the trial court. *Wright v. Hanson*, 248 Ga. 523, 283 S.E.2d 882 (1981), decided prior to 1984 amendment.

Applicable to child custody habeas corpus actions. — The addition (by Ga. L. 1984, p. 599, § 2) of the term "child custody, and other domestic relations cases including, but not limited to" in paragraph (2) of subsection (a) was intended to add child custody habeas corpus actions to the purview of this section. *Leonard v. Benjamin*, 253 Ga. 718, 324 S.E.2d 185 (1985).

Failure to file notice of appeal pursuant to § 5-6-38. — When the custodial parent in a child custody habeas corpus proceeding unnecessarily files an application for appeal in accordance with this section, and the Supreme Court grants the application, and a notice of appeal then is timely filed, the Supreme Court has jurisdiction of the appeal even though no notice of appeal was

filed in accordance with § 5-6-38 within 30 days from entry of judgment in the trial court. *Wright v. Hanson*, 248 Ga. 523, 283 S.E.2d 882 (1981).

Appeal involving change of custody falls within provisions of paragraph (a)(2) and subsection (d) of this section, which require an application to be filed directly with the Court of Appeals within 30 days of the filing of the order changing visitation rights. On failing to follow these requirements, this section precludes vesting of jurisdictional powers either in the trial court based on an appeal to a final judgment or in the Court of Appeals as a discretionary appeal. *Jones v. Warrenfells*, 166 Ga. App. 519, 305 S.E.2d 147 (1983); *Dudai v. Spisak*, 170 Ga. App. 744, 318 S.E.2d 501 (1984); *Brandenburg v. Brandenburg*, 175 Ga. App. 18, 332 S.E.2d 665 (1985).

An order modifying custody, issued following a "temporary" hearing under USCR 24.5 was final. In a post-decree custody modification action authorized by §§ 19-9-1(b) and 19-9-3(b), the trial court is without authority to enter a "temporary" custody award. *Hightower v. Martin*, 198 Ga. App. 855, 403 S.E.2d 862 (1991).

There is nothing in this section which excludes custody cases involving the state. In *re J.E.P.*, 252 Ga. 520, 315 S.E.2d 416 (1984).

Motion for modification of a juvenile court order terminating parental rights is similar to a motion to set aside under § 9-11-60(d), which is appealable but does not sustain an appeal from the underlying judgment. In *re H.A.M.*, 201 Ga. App. 49, 410 S.E.2d 319 (1991).

Denial of stepfather's petition to adopt his ten-year old stepdaughter was directly appealable, as all petitions for adoption, whether granted or denied, whether terminating parental rights, or not, do not come within paragraph (2) of subsection (a). In *re J.S.J.*, 180 Ga. App. 873, 350 S.E.2d 843 (1986).

Contempt of visitation order. — A judgment holding mother in contempt of an order which granted visitation rights to father was not directly appealable since the order constituted a child custody order for purposes of paragraph (a)(2) of this Code section. *Burnett v. Coleman*, 170 Ga. App. 394, 317 S.E.2d 546 (1984).

The denial of a petition to hold the

Application (Cont'd)**2. Judgments Concerning Child Custody (Cont'd)**

mother in contempt of the final judgment and decree of divorce which granted the father visitation rights to the parties' child can be reviewed only by application for discretionary appeal, because visitation privileges are a part of custody. *Hosch v. Hosch*, 184 Ga. App. 370, 361 S.E.2d 686 (1987), cert. denied, 484 U.S. 1067, 108 S. Ct. 1030, 98 L. Ed. 2d 994 (1988).

Child support delinquency proceedings.

— An appeal from a judgment on the pleadings in an action to set aside a judgment awarding delinquent child support payments is not an appeal concerning those issues as enumerated in paragraph (a)(2). *Karsman v. Portman*, 170 Ga. App. 194, 316 S.E.2d 819 (1984).

Appeal of denial of foster child custody change petition. — Where the appellants failed to file an application for appellate review following the denial of their petition by the juvenile court which sought to have legal custody of a foster child changed from the county department of family and children services to themselves, the appeal was dismissed. *In re C.P.H.*, 169 Ga. App. 122, 311 S.E.2d 850 (1983).

Grandparents seeking appellate review of an unfavorable ruling regarding visitation privileges are, like parents, required to follow the procedure necessary to secure a discretionary appeal. *Tuttle v. Stauffer*, 177 Ga. App. 112, 338 S.E.2d 544 (1985).

Appeal from juvenile court decision in deprivation proceeding. — The Court of Appeals had jurisdiction to consider a father's appeal from the juvenile court's judgment in a deprivation proceeding. *In re A.L.L.*, 211 Ga. App. 767, 440 S.E.2d 517 (1994).

Adoption cases. — Appeal from a declaratory judgment action brought by an adoption agency to determine the validity of the surrender of parental rights and the adoption procedure was not subject to the discretionary appeal procedures of this section. *Families First v. Gooden*, 211 Ga. App. 272, 439 S.E.2d 34 (1993).

3. Divorce

Where the "underlying subject matter" of the case is divorce, the General Assembly

intends the case to be brought to the Supreme Court by application pursuant to this section rather than by direct appeal. *Rolleston v. Rolleston*, 249 Ga. 208, 289 S.E.2d 518 (1982).

Where the issue sought to be appealed clearly arises from divorce proceedings, the appeal procedures of this section control. *Tobitt v. Tobitt*, 249 Ga. 245, 290 S.E.2d 49 (1982).

Appeal from denial of superior court petition seeking separate maintenance and equitable division of property and to enjoin matters pending in juvenile court was dismissed for failure to comply with paragraph (a)(2) of this section. *Floyd v. Floyd*, 250 Ga. 208, 296 S.E.2d 607 (1982).

A case involving a "domestic relations" issue wherein appellant sought domestication and "correction" of a foreign divorce decree, normally within the jurisdiction of the Court of Appeals, also involved claims based upon an unincorporated settlement agreement which raised no "domestic relations" issue and, therefore, the Supreme Court had jurisdiction over the direct appeal from the grant of summary judgment in favor of the former husband as to the former wife's claims for specific performance of the settlement agreement and jurisdiction over the rulings on all the former wife's claims, including the "domestic relations" claim. *Eickhoff v. Eickhoff*, 263 Ga. 498, 435 S.E.2d 914 (1993).

Appeal of petition for reformation of separation agreement. — Where an agreement purporting to resolve all matters arising out of marriage is incorporated into a final decree of divorce, the rights of the parties are based on the final decree and not the underlying agreement and appeal is within this section. *Paul v. Paul*, 250 Ga. 54, 296 S.E.2d 48 (1982).

Appeals arising out of paternity petitions are domestic relations cases which require compliance with the discretionary appeal procedure of this section. *Brown v. Department of Human Resources*, 204 Ga. App. 27, 418 S.E.2d 404 (1992).

Direct appeal in action for breach of contract contemporaneous with divorce settlement. — In a direct appeal by appellant, the former wife of the appellee, upon an action for breach of a contract entered into by the parties contemporaneous with the

divorce settlement and judgment, where appellee argued that the suit (enforcement of divorce or domestic relations settlement or agreement) was subject only to discretionary appeal under subsection (a)(2) of this Code section, and that the direct appeal should be dismissed, the court found that a former husband and wife may enter into contractual agreements separate from any decreed by the court upon a divorce and that the action was for a breach of contract, and directly appealable. *Scott v. Mohr*, 191 Ga. App. 825, 383 S.E.2d 190 (1989).

Appeal of contempt order. — Where the jury specifically designates a property transfer as alimony in a divorce case, the Court of Appeals does not have jurisdiction of an appeal of a contempt order entered therein, which by law is subject to application for discretionary appeal to the Supreme Court. *Cale v. Byrdwell*, 166 Ga. App. 901, 305 S.E.2d 468 (1983).

A notice of appeal from a judgment of contempt regarding a domestic relations decree (finding violations by harassment, abuse, threats, assaults, annoyances, and willful refusal to make house payments as ordered), which judgment imposed a 20-day unconditional imprisonment, was dismissed for failure to file an application for appeal pursuant to paragraph (a)(2). *Russo v. Manning*, 252 Ga. 155, 312 S.E.2d 319 (1984).

Seeking federal relief where fraudulent obtaining of divorce alleged. — A federal district court could not enjoin enforcement of a state court judgment in a divorce proceeding that had been allegedly obtained by fraud and which, therefore, allegedly deprived the plaintiff of property without due process of law, in that the plaintiff failed to state a claim under the federal civil rights statute, because the existence of adequate review procedures under Georgia law accorded the plaintiff sufficient due process. *Collins v. Collins*, 597 F. Supp. 33 (N.D. Ga. 1984).

Enforcement of divorce judgment. — An action by a former wife against the state retirement system, seeking an order compelling the system to pay, directly to her, her share of her former husband's retirement benefits under a divorce judgment, was not a divorce case and an application to appeal was not required. *Bryant v. Employees Retirement Sys.*, 264 Ga. 125, 441 S.E.2d 757 (1994).

Suit brought against former spouse seeking to domesticate out-of-state judgment in divorce proceeding and to have spouse attached for contempt and ordered to pay arrearages was a suit on a foreign judgment, not a divorce or alimony case within the meaning of Georgia's Constitution, and jurisdiction of appeal was in the Court of Appeals. *Lewis v. Robinson*, 254 Ga. 378, 329 S.E.2d 498 (1985).

Suit to domesticate Ohio divorce judgment and have husband held in contempt was a "contempt" or "other domestic relations case" under paragraph (a)(2) for direct versus discretionary appeal purposes. *Lewis v. Robinson*, 176 Ga. App. 374, 336 S.E.2d 280 (1985).

4. Garnishment

Failure to obtain order permitting filing of appeal. — Where appellant files a direct appeal from an order granting defendant-garnishee's motion to open a default judgment but appellant has failed to obtain an order of the appellate court permitting the filing of an appeal pursuant to paragraph (4) of subsection (a), the appeal must be dismissed. *Wallace v. Saks Fifth Ave., Atlanta, Inc.*, 180 Ga. App. 679, 350 S.E.2d 308 (1986); *Easley, McCaleb & Stallings, Ltd. v. Gateway Mgt.*, 191 Ga. App. 588, 382 S.E.2d 373 (1989).

5. Revocation of Probation

Appeal from order revoking probation included. — An appeal from an order revoking probation is one of the type of cases which must follow the procedure set forth in this statute. *Yellock v. State*, 179 Ga. App. 250, 345 S.E.2d 897 (1986).

Appeals from orders revoking probation must be made by application filed directly with the appropriate court within 30 days of the date of the revocation order. *Scriven v. State*, 179 Ga. App. 513, 346 S.E.2d 906 (1986).

Adjudication of guilt which revokes probationary status. — The proper method of appeal from an order of adjudication of guilt and sentence which serves to revoke the probationary status granted under the First Offender Act is by discretionary appeal, as provided in paragraph (a)(5), rather than direct appeal. *Dean v. State*, 177 Ga. App.

Application (Cont'd)**5. Revocation of Probation (Cont'd)**

123, 338 S.E.2d 711 (1985); *Anderson v. State*, 177 Ga. App. 130, 338 S.E.2d 716 (1985); *Merciers v. State*, 212 Ga. App. 424, 444 S.E.2d 416 (1994).

Appeal dismissed for lack of jurisdiction.

— Where following the revocation of his probation, the appellant filed a "Petition for Appeal" with the trial court, which the trial court dismissed, following which the appellant filed an "Out-of-Date Appeal" to court of appeals, as no application was filed directly in time, the appeal must be dismissed for lack of jurisdiction. *Scriven v. State*, 179 Ga. App. 513, 346 S.E.2d 906 (1986).

Appeal by the state from the grant of probationer's motion to suppress was dismissed since a revocation of probation hearing is not a criminal proceeding for purposes of a direct appeal; jurisdiction would lie upon application only. *State v. Wilbanks*, 215 Ga. App. 223, 450 S.E.2d 293 (1994).

6. Damages Where Judgment Is \$10,000.00 or Less

Editor's notes. — Many of the cases cited below were decided prior to the 1991 amendment, which increased the amount from \$2,500.00 to \$10,000.00.

Applicable to summary judgments. — The discretionary appeal provisions of paragraph (a)(6) apply to judgments in the amount of \$2,500.00 or less (now \$10,000.00 or less) obtained by verdict following a bench or jury trial as well as by summary judgment, so that the court of appeals would be unable to exercise jurisdiction to review the merits on a direct appeal of a summary judgment in a suit on an account for the principal sum of \$546.19 plus \$43.70 interest and court costs in the amount of \$28.00. *Perryman v. Georgia Power Co.*, 180 Ga. App. 259, 348 S.E.2d 762 (1986).

Paragraph (a)(6) is applicable to judgments in the amount of \$2,500 or less (now \$10,000.00 or less) obtained by a verdict following a bench or jury trial, as well as by summary judgment. *Covrig v. Campbell*, 187 Ga. App. 39, 369 S.E.2d 293, cert. denied, 187 Ga. App. 907, 369 S.E.2d 762 (1988).

The defendant's direct appeal from summary judgment entered against her in the amount of \$1,451.13 principal, plus \$87.07

interest was dismissed since the judgment was for \$2,500 or less, and the discretionary appeal procedures of this Code section were required. *Batchelor v. ISFA Corp.*, 191 Ga. App. 238, 382 S.E.2d 434 (1989).

Paragraph (a)(6) does not apply to appeal from judgment in favor of a defendant. *Motor Fin. Co. v. Davis*, 188 Ga. App. 291, 372 S.E.2d 674 (1988).

Inapplicable where no recovery obtained.

— Paragraph (a)(6) is applicable only where the appellant is seeking to appeal a money judgment for an amount ranging from 1¢ through \$2,500.00 (now \$10,000.00), and not where the appellant has sought a money judgment but has obtained no recovery whatever. *Whatley v. Bank S.*, 185 Ga. App. 896, 366 S.E.2d 182, cert. denied, 185 Ga. App. 911, 366 S.E.2d 182 (1988); *Department of Human Resources v. Prince*, 198 Ga. App. 329, 401 S.E.2d 342 (1991).

Paragraph (a)(6) does not apply where action and judgment are for writ of possession. *Brown v. Associates Fin. Servs. Corp.*, 255 Ga. 457, 339 S.E.2d 590 (1986).

"Judgment" relates to the final result of an action for damages. *City of Brunswick v. Todd*, 255 Ga. 448, 339 S.E.2d 589 (1986).

Amount of judgment is determinative. — Under paragraph (6) of subsection (a), it is the amount of the underlying final judgment from which an appeal is taken, not the enumerations of error, which determines the direct or discretionary appealability of any given case. *Ostrom v. Kapetanacos*, 185 Ga. App. 728, 365 S.E.2d 849 (1988).

Direct appeal on zero award. — Plaintiff was authorized to file direct, rather than discretionary, appeal as to "zero" award on main claim, and portion of judgment pertaining to counterclaim on which less than \$10,000 was awarded would also be reviewable on direct appeal. *Robinwood, Inc. v. Baker*, 206 Ga. App. 202, 425 S.E.2d 353 (1992).

Amount of damage judgment applicable, whether issues decided by court or jury. — An application to appeal is required when a party seeking a money judgment prevails, that is, a judgment for some sum is obtained but the award is \$2,500.00 or some lesser sum. The use of the amount of the judgment would apply whether the issues are decided by the court or by a jury. *Brown v. Associates Fin. Servs. Corp.*, 255 Ga. 457, 339 S.E.2d 590 (1986).

Paragraph (a)(6) applies to judgments in the amount of \$2,500.00 or less (now \$10,000.00 or less) obtained by verdict following a bench or jury trial as well as by summary judgment. *Jarrett v. Ford Motor Credit Co.*, 178 Ga. App. 600, 344 S.E.2d 440 (1986).

Awards for bad faith are within the category of "damages" as contemplated by paragraph (a)(6), requiring an application to appeal in all actions in which the judgment is \$2,500.00 or less. *MTW Inv. Co. v. Vanguard Properties Fin. Corp.*, 179 Ga. App. 403, 346 S.E.2d 575, *aff'd*, 256 Ga. 318, 349 S.E.2d 749 (1986); *Landor Condominium Consultants, Inc. v. Colony Place Condominium Ass'n*, 195 Ga. App. 840, 395 S.E.2d 25 (1990).

Where the judgment was a determination of nonliability on the part of defendant, as such it is a matter of direct appeal and not controlled by the requirements for discretionary appeal in paragraph (a)(6). Consequently, appellee's motion to dismiss for failure to comply with subsection (a)(6) must be denied. *Turner v. Taylor*, 179 Ga. App. 574, 346 S.E.2d 920 (1986).

Where trial court entered judgment for \$800.00, after jury returned verdict of \$5,800.00, but the parties had stipulated that any jury verdict would be reduced by \$5,000.00, as that amount had already been received by plaintiff under his insurance coverage, plaintiff was required to follow the discretionary appeal procedure of paragraph (6) of subsection (a) of this section. *Barikos v. Vanderslice*, 177 Ga. App. 884, 341 S.E.2d 513 (1986), overruled on other grounds, *Bales v. Shelton*, 260 Ga. 335, 391 S.E.2d 394 (1990).

Amount of judgment reduced by payments from collateral source. — In a tort action, set-offs to the judgment that arise from some collateral source — such as prior payments, or pre-existing debts — should not be considered when deciding whether an application for appeal is necessary under subsection (a)(6). *Bales v. Shelton*, 260 Ga. 335, 391 S.E.2d 394 (1990).

The prospective application of *Bales v. Shelton*, 260 Ga. 335, 391 S.E.2d 394 (1990) applies only to those pending appeals in which the appellant had relied on the prior holdings in *City of Brunswick v. Todd*, 255 Ga. 448, 339 S.E.2d 589 (1986) and *Barikos*

v. Vanderslice, 177 Ga. App. 884, 341 S.E.2d 513 (1986). It was not intended in *Bales* to require the dismissal of an appeal of a judgment that exceeds \$2,500 (now \$10,000), prior to set-offs from a collateral source, on the ground that, at the time the notice of appeal was filed, an appeal application was required under *Barikos*. *Lee v. Britt*, 260 Ga. 757, 400 S.E.2d 5 (1991).

Judgment entitling landlord to retain a \$2,500 earnest money deposit as liquidated damages, and requiring tenants to pay \$1,200 as increased rent, exceeded \$2,500, and, accordingly, was subject to direct appeal. *Alexander v. Steining*, 197 Ga. App. 328, 398 S.E.2d 390 (1990).

Dispossession actions. — This Code section is applicable only to dispossession actions in which the only issue to be resolved is rent due of \$2,500 or less. *Housing Auth. v. Bigsby*, 200 Ga. App. 878, 410 S.E.2d 44 (1991).

7. Appeals Under § 9-11-60

Denial of application for discretionary review. — A denial of the application for discretionary review could have been based merely on a determination that the application was rendered redundant and unnecessary by the pendency of a present appeal and did not constitute a prior adjudication of the merits of the present appeal. *Berger & Washburne Ins. Agency, Inc. v. Commercial Ins. Brokers, Inc.*, 204 Ga. App. 146, 418 S.E.2d 640 (1992).

Denial of motion to set aside judgment. — While the denial of a motion to set aside may be considered appealable in its own right where the motion is filed pursuant to Code Section 9-11-60(d), the right of appeal is conditioned, under such circumstances, upon compliance with the application procedures set forth in this Code section. *North Carolina Constr. Co. v. Action Mobilplatform, Inc.*, 187 Ga. App. 507, 370 S.E.2d 800 (1988).

Appeals from the denial of a motion to set aside the judgment under § 9-11-60(d) are subject to the discretionary appeals procedure even when coupled with motions for a new trial or judgment *n.o.v.* *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991).

An appeal from an order denying a mo-

Application (Cont'd)**7. Appeals Under § 9-11-60 (Cont'd)**

tion to set aside filed pursuant to § 9-11-60(d) is subject to the application procedures set forth in subsection (b). *Agency Mgt. Servs. v. Escape Travel/Tour Servs.*, 199 Ga. App. 882, 406 S.E.2d 285 (1991).

Since, regardless of how appellant's motion was denominated, the basis of the motion was that the consent judgment was entered in violation of the settlement agreement, the proper vehicle through which to take exception to the judgment was a motion to set aside and not a motion for new trial. Accordingly, appellant failed to follow the discretionary appeal procedures of § 5-6-35(b). *Magnum Communications, Ltd. v. IBM*, 206 Ga. App. 131, 424 S.E.2d 379 (1992).

An order which simultaneously denies both a motion for new trial and a motion to vacate or set aside a judgment is not directly appealable. *Gooding v. Boatright*, 211 Ga. App. 221, 438 S.E.2d 685 (1993).

Denial of motion to set aside default judgment. — The Court of Appeals lacks jurisdiction to consider a direct appeal from a trial court's order denying a motion to set aside a default judgment where the court previously held that a discretionary appeal was the only appellate remedy available and the application for a discretionary appeal was denied. *Lewis v. Sun Mgt., Inc.*, 187 Ga. App. 591, 370 S.E.2d 840 (1988).

Although the Court of Appeals had jurisdiction to consider the grant of appellee's § 9-11-60(g) motion to correct a clerical mistake in a default judgment, the court had no jurisdiction to address the denial of appellants' § 9-11-60(d) motion to set aside the default judgment, because an application must be filed to appeal from an order denying a motion to set aside a judgment. *Brooks v. Federal Land Bank*, 193 Ga. App. 591, 388 S.E.2d 704 (1989); *TMS Ins. Agency, Inc. v. Galloway*, 205 Ga. App. 896, 424 S.E.2d 71 (1992).

Correction of clerical mistakes. — Although, basically, the import and result of motions to set aside and to correct judgments are in most instances identical, and logically the Legislature probably did not contemplate allowing direct appeals from

orders under § 9-11-60(g) (correcting clerical mistakes) while mandating a discretionary approach for those under § 9-11-60(d) (motion to set aside judgment), the clear language of the statute prevents an interpretation which would render both motions subject to subsection (b) of this section, and, therefore, § 9-11-60(g) motions do not require applications to appeal. *Crawford v. Kroger Co.*, 183 Ga. App. 836, 360 S.E.2d 274, cert. denied, 183 Ga. App. 905, 360 S.E.2d 274 (1987).

Motion for limited remand. — Where consideration of an issue raised in a motion for limited remand is not necessary to the disposition of an appeal, it is appropriate that the normal procedure for motions under § 9-11-60(d)(2) be followed, including procedures for appellate review if necessary. *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991).

8. Attorney's Fees or Expenses

When application not required. — A judgment awarding attorney's fees and costs of litigation pursuant to § 9-15-14 may be reviewed on direct appeal, when it is appealed as part of a judgment that is directly appealable. The application required by this section need not be filed on the separate costs and fees issue. *Haggard v. Board of Regents*, 257 Ga. 524, 360 S.E.2d 566 (1987).

An appeal from an award of expenses of litigation under § 9-15-14 is discretionary when not appealed as part of a judgment that is directly appealable. *Cheeley-Towns v. Rapid Group, Inc.*, 212 Ga. App. 183, 441 S.E.2d 452 (1994).

Lacking application, appeal dismissed. — Appeals from awards of attorney fees or expenses of litigation under Code Section 9-15-14 require application for appellate review. Lacking such an application, the appellate court is without jurisdiction to entertain the appeal and it must be dismissed. *Loveless v. Pickering*, 187 Ga. App. 49, 369 S.E.2d 281, cert. denied, 187 Ga. App. 908, 369 S.E.2d 281 (1988).

9. Zoning Cases

Paragraph (a)(1) applicable to appeals in zoning cases. — All zoning cases appealed either to the Court of Appeals or the Su-

preme Court of Georgia must come by application, since in neither case is the appeal direct because it is an appeal from the decision of a court reviewing a decision of an

administrative agency within the meaning of this section. *Trend Dev. Corp. v. Douglas County*, 259 Ga. 425, 383 S.E.2d 123 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 309-315.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 298-319.

ALR. — *Coram nobis* on ground of newly discovered evidence, 33 ALR 84.

Appealability of order entered on motion to strike pleading, 1 ALR2d 422.

Retrospective increase in allowance for alimony, separate maintenance, or support, 52 ALR3d 156.

5-6-36. Filing of motion for new trial and motion for judgment notwithstanding verdict where appeal taken from judgment, ruling, or order.

(a) A motion for new trial need not be filed as a condition precedent to appeal or consideration of any judgment, ruling, or order in any case; but, in all cases where a motion for new trial is an available remedy, the party entitled thereto may elect to file the motion first or to appeal directly. However, where matters complained of arise or are discovered subsequent to verdict or judgment which otherwise would not appear in the record, such as newly discovered evidence, and in other like instances, a motion for new trial or other available procedure shall be filed and together with all proceedings thereon shall become a part of the record on appeal. Otherwise, the motion for new trial need not be transmitted as a part of the record on appeal; nor shall it be necessary that the overruling thereof be enumerated as error (subject to the exception last stated), as the appellate court may consider all questions included in the enumeration of errors provided for in Code Section 5-6-40. The entry of judgment on a verdict by the trial court constitutes an adjudication by the trial court as to the sufficiency of the evidence to sustain the verdict, affording a basis for review on appeal without further ruling by the trial court.

(b) A motion for judgment notwithstanding the verdict need not be filed as a condition precedent to review upon appeal of an order or ruling of the trial court overruling a motion for directed verdict; but, in all cases where the motion is an available remedy, the party may file the motion or appeal directly from the final judgment and enumerate as error the overruling of the motion for directed verdict. (Ga. L. 1965, p. 18, § 2; Ga. L. 1966, p. 493, § 1.)

Cross references. — Motions for judgment notwithstanding the verdict and motions for new trial after entry of judgment or, if verdict not returned, after discharge of jury, § 9-11-50. Filings in clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Filing of papers, Rules of the Court of Appeals of the State of Georgia, Rule 5. Preparation and filing of motions, Rules of the Court of Appeals of the State of Georgia, Rule 32.

Law reviews. — For note discussing the

reluctance of Georgia courts to grant appeals as allowed under this article and Ch. 11, T. 9 when overruled motion for new trial

not enumerated as error in light of *Hill v. Willis*, 224 Ga. 263, 161 S.E.2d 281 (1968), see 5 Ga. St. B.J. 269 (1968).

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Appellants may elect to attack judgment in court below or to appeal directly. *Dempsey v. Ellington*, 125 Ga. App. 707, 188 S.E.2d 908 (1972).

Subsection (a) gives litigant option to appeal directly, or first move for new trial. — Subsection (a) clearly gives litigant the right to appeal directly from an adverse verdict and judgment, or to defer appeal until a ruling is obtained on motion for new trial. *Brisette v. Munday*, 115 Ga. App. 131, 153 S.E.2d 606 (1967).

Effect of filing of motion for new trial is to toll time for filing appeal from judgment on the verdict until the motion for new trial is overruled (unless appellant should elect to abandon or dismiss the motion). *Allen v. Rome Kraft Co.*, 114 Ga. App. 717, 152 S.E.2d 618 (1966); *A & D Barrel & Drum Co. v. Fuqua*, 132 Ga. App. 827, 209 S.E.2d 272 (1974).

Appeal from ruling on motion for new trial or from original judgment rendered. — Since filing of motion for new trial is not condition precedent to appeal, an appeal may be made directly from any other appealable judgment, ruling, or order, but this does not negate appealability of ruling on motion for new trial when that procedure is utilized and it is desired to appeal from such ruling. The result is practically identical moreover, since the same grounds of appeal may be urged whichever judgment is appealed from and appellants are not limited to grounds of motion for new trial in any appeal. *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Appellant not limited on appeal to issues presented in motion for new trial. *Hulsey v. Sears, Roebuck & Co.*, 138 Ga. App. 523, 226 S.E.2d 791 (1976).

Appellant may argue all properly raised enumerations of error as well as matters contained in new trial motion. *Hulsey v. Sears, Roebuck & Co.*, 138 Ga. App. 523, 226 S.E.2d 791 (1976).

The overruling of his motion for directed verdict may be enumerated as error by the

defendant in a criminal case. *Merino v. State*, 230 Ga. 604, 198 S.E.2d 311 (1973).

Appellant need not enumerate as error the judgment overruling motion for new trial in order to confer jurisdiction of appeal upon appellate court. *State Hwy. Dep't v. Hilliard*, 114 Ga. App. 328, 151 S.E.2d 491 (1966).

Adverse ruling on motion for judgment n.o.v. must be enumerated as error on appeal. — Losing party may file motion for judgment n.o.v., or he may appeal directly from judgment and enumerate as error the denial of a directed verdict. If he files a motion for judgment n.o.v. and obtains a ruling on it he has used that device as a means of reviewing the motion for directed verdict at trial level. If ruling is adverse he must enumerate it as error on appeal or become bound by the ruling and judgment unexcepted to, which becomes the law of the case. *Wood v. Mobley*, 114 Ga. App. 170, 150 S.E.2d 358 (1966).

To set aside judgment predicated upon jury verdict requires direct appeal or new trial. — Where judgment is predicated upon jury verdict, court has no plenary right to vacate, revise, etc. To set aside that kind of judgment the verdict must also be set aside, except for defects appearing on face of record; remedy is by motion for new trial, or by direct appeal under this section. *Thompson v. Maslia*, 127 Ga. App. 758, 195 S.E.2d 238 (1972).

Procedure for excepting to judgment awarding child custody. — Where losing party in child custody case desires to except to judgment awarding custody of child, proper procedure is by direct exceptions to decree, and not by motion for new trial. *Alf v. Alf*, 226 Ga. 880, 178 S.E.2d 187 (1970).

Appellate court may review sufficiency of evidence although not considered in motion for new trial. *Gilman Paper Co. v. James*, 235 Ga. 348, 219 S.E.2d 447 (1975).

Sufficiency of evidence, not its weight, is reviewed. — The weight of the evidence and the credibility of witnesses are questions for the triers of fact. The Court of Appeals passes on the sufficiency of the evidence, not

its weight, which is considered by the jury. *Mosley v. State*, 157 Ga. App. 578, 278 S.E.2d 154 (1981).

The role of an appellate court is not to pass on the weight of the evidence but the sufficiency. If there is any evidence to support the verdict of the trial court the appellate court cannot disturb it. *Gay v. City of Rome*, 157 Ga. App. 368, 277 S.E.2d 741 (1981).

While the trier of fact can and must weigh and analyze the evidence, an appellate court, in reviewing on the general grounds, is restricted to determining if there is sufficient evidence to support the judgment of conviction. After conviction, the evidence in the record is reviewed on appeal in the light most favorable to the state. *Gibbs v. State*, 157 Ga. App. 530, 278 S.E.2d 111 (1981).

Cited in *Undercofler v. White*, 113 Ga. App. 853, 149 S.E.2d 845 (1966); *St. Paul Fire & Marine Ins. Co. v. Postell*, 113 Ga. App. 862, 149 S.E.2d 864 (1966); *Crider v. State*, 114 Ga. App. 523, 151 S.E.2d 792 (1966); *Daniel v. Daniel*, 222 Ga. 861, 152 S.E.2d 873 (1967); *Sutton v. State*, 223 Ga. 313, 154 S.E.2d 578 (1967); *Kirkman v. Miller*, 116 Ga. App. 78, 156 S.E.2d 558 (1967); *Foskey v. State*, 116 Ga. App. 334, 157 S.E.2d 314 (1967); *Jackson v. Mayor of Carrollton*, 116 Ga. App. 323, 157 S.E.2d 500 (1967); *Hill v. General Rediscount Corp.*, 116 Ga. App. 459, 157 S.E.2d 888 (1967); *Gardner v. State*, 117 Ga. App. 262, 160 S.E.2d 271 (1968); *Hill v. Willis*, 224 Ga. 263, 161 S.E.2d 281 (1968); *Crowley v. State*, 118 Ga. App. 7, 162 S.E.2d 299 (1968); *Tiller v. State*, 224 Ga. 645, 164 S.E.2d 137 (1968); *Yale & Towne, Inc. v. Sharpe*, 118 Ga. App.

480, 164 S.E.2d 318 (1968); *Lansford v. Gatliff*, 119 Ga. App. 145, 166 S.E.2d 639 (1969); *Taylor v. Buckhead Glass Co.*, 120 Ga. App. 663, 171 S.E.2d 779 (1969); *Walker v. Camp*, 121 Ga. App. 765, 175 S.E.2d 53 (1970); *Hichman v. Frazier*, 128 Ga. App. 552, 197 S.E.2d 441 (1973); *Buffington v. McClelland*, 130 Ga. App. 460, 203 S.E.2d 575 (1973); *Shaddrix v. Womack*, 231 Ga. 628, 203 S.E.2d 225 (1974); *Guardian of Ga., Inc. v. Granite Equip. Leasing Corp.*, 130 Ga. App. 514, 203 S.E.2d 733 (1974); *Glover v. Southern Bell Tel. & Tel. Co.*, 132 Ga. App. 74, 207 S.E.2d 584 (1974); *Wooten v. State*, 135 Ga. App. 97, 217 S.E.2d 350 (1975); *Schwartz v. C & S Mtg. Co.*, 142 Ga. App. 682, 236 S.E.2d 856 (1977); *Adderholt v. Adderholt*, 240 Ga. 626, 242 S.E.2d 11 (1978); *Grizzle v. Federal Land Bank*, 145 Ga. App. 385, 244 S.E.2d 362 (1978); *Jackson v. State*, 154 Ga. App. 367, 268 S.E.2d 418 (1980); *Bennett v. Caton*, 154 Ga. App. 515, 268 S.E.2d 786 (1980); *DOT v. Claussen Paving Co.*, 246 Ga. 807, 273 S.E.2d 161 (1980); *Battle v. Yancey Bros. Co.*, 157 Ga. App. 277, 277 S.E.2d 280 (1981); *Fuller v. State*, 159 Ga. App. 512, 284 S.E.2d 29 (1981); *City of Atlanta v. West*, 160 Ga. App. 609, 287 S.E.2d 558 (1981); *Johnson v. Hensel Phelps Constr. Co.*, 250 Ga. 83, 295 S.E.2d 841 (1982); *Hensel Phelps Constr. Co. v. Johnson*, 161 Ga. App. 631, 295 S.E.2d 843 (1982); *Hensel Phelps Constr. Co. v. Johnson*, 164 Ga. App. 404, 298 S.E.2d 261 (1982); *Stewart v. State*, 165 Ga. App. 428, 300 S.E.2d 331 (1983); *California Fed. Sav. & Loan Ass'n v. Hudson*, 185 Ga. App. 384, 364 S.E.2d 582 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 *Am. Jur. 2d*, Appeal and Error, §§ 555, 556. 58 *Am. Jur. 2d*, New Trial, §§ 414-430.

C.J.S. — 4 *C.J.S.*, Appeal and Error, §§ 202, 207, 217, 224-230, 275-277.

ALR. — Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 *ALR* 725.

Abandonment of appeal or right of appeal by commencement, or prosecution to judgment, of another action, 115 *ALR* 121.

Appealability of order overruling motion for directed verdict, or for judgment, or the like, where the jury has disagreed, 40 *ALR2d* 1284.

Delay as affecting right to coram nobis attacking criminal conviction, 62 *ALR2d* 432.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 88 *ALR2d* 1275.

Appeal by state of order granting new trial in criminal case, 95 *ALR3d* 596.

5-6-37. Filing and contents of notice of appeal; service of notice upon parties to appeal.

Unless otherwise provided by law, an appeal may be taken to the Supreme Court or the Court of Appeals by filing with the clerk of the court wherein the case was determined a notice of appeal. The notice shall set forth the title and docket number of the case; the name of the appellant and the name and address of his attorney; a concise statement of the judgment, ruling, or order entitling the appellant to take an appeal; the court appealed to; a designation of those portions of the record to be omitted from the record on appeal; a concise statement as to why the appellate court appealed to has jurisdiction rather than the other appellate court; and, if the appeal is from a judgment of conviction in a criminal case, a brief statement of the offense and the punishment prescribed. The appeal shall not be dismissed nor denied consideration because of failure to include the jurisdictional statement or because of a designation of the wrong appellate court. In addition, the notice shall state whether or not any transcript of evidence and proceedings is to be transmitted as a part of the record on appeal. Approval by the court is not required as a condition to filing the notice. All parties to the proceedings in the lower court shall be parties on appeal and shall be served with a copy of the notice of appeal in the manner prescribed by Code Section 5-6-32. (Ga. L. 1965, p. 18, § 4; Ga. L. 1966, p. 493, § 2; Ga. L. 1973, p. 303, § 1.)

Cross references. — Filings in clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Filing with clerk's office, Rules of the Court of Appeals of the State of Georgia, Rule 1. Filing of papers, Rules of the Court of Ap-

peals of the State of Georgia, Rule 5. Notices of appeal and cross appeal, Rules of the Court of Appeals of the State of Georgia, Rule 33.

Law reviews. — For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991).

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CONTENT OF NOTICE OF APPEAL

PARTIES TO APPEAL

General Consideration

"Proceedings in lower court" as used in section should be liberally construed. — To define "proceedings in lower court," as used in this section to mean only those proceedings which directly relate to appellant's enumerations of error is unduly restrictive because liberal construction comports with policies of this article, enhances efficient

administration of justice, and avoids multiplicity of appeals. *Executive Jet Sales, Inc. v. Jet Am., Inc.*, 242 Ga. 307, 248 S.E.2d 676 (1978).

A verdict is not an appealable decision or judgment within purview of section. *Williams v. Keebler*, 222 Ga. 437, 150 S.E.2d 674, answer conformed to 114 Ga. App. 332, 151 S.E.2d 483 (1966).

Appellant responsible for contents of record. — It is appellant's burden to designate what shall be included in the record on appeal; failing which the Court of Appeals is not authorized to go outside the record and accept assertions of fact in briefs which are not supported by the record, nor accept as fact what is asserted by way of argument in a transcript. *Doe v. State*, 205 Ga. App. 322, 422 S.E.2d 558 (1992).

The burden is on the appellant to direct transmittal of the trial transcript and, lacking a transcript of the evidence, the court of appeals must assume that the proceedings, the jury's verdict, and the judgment entered upon that verdict, were correct. *Durham v. Winn-Dixie Stores*, 215 Ga. App. 209, 450 S.E.2d 257 (1994).

Court of Appeals lacks jurisdiction to review jury verdicts. — Where there is only an appeal from a jury verdict, and no description of an appealable judgment or order, there is nothing to review, and Court of Appeals has no jurisdiction since it is a court for corrections of errors of law alone. *Interstate Fire Ins. Co. v. Chattam*, 222 Ga. 436, 150 S.E.2d 618, answer conformed to 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Trial court is not deprived of jurisdiction because appellant fails to serve notice of appeal on appellee as required. *Bull v. Bull*, 243 Ga. 72, 252 S.E.2d 494 (1979).

Where third-party defendant not harmed by failure of service. — Appeal shall not be dismissed where counsel for third-party defendant appeared in court and argued merits of his claim both orally and by brief, it appears that third-party defendant was not harmed by failure of service, and there is no ground to dismiss the appeal. *Petroleum Carrier Corp. v. Jones*, 127 Ga. App. 676, 194 S.E.2d 670 (1972).

Delay in filing of transcript is not necessarily cause for dismissal. — Delay in filing of transcript, if it does not delay docketing and hearing of case in appellate court, is not cause for dismissal. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Delay caused by clerk of court. — The Constitution forbids dismissal of any case where delay is attributable to clerk of court rather than to counsel. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431

(1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Cited in *Mobley v. State*, 221 Ga. 716, 146 S.E.2d 735 (1966); *Taylor v. Haygood*, 113 Ga. App. 30, 147 S.E.2d 48 (1966); *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966); *Birdwell v. Pippen*, 113 Ga. App. 202, 147 S.E.2d 673 (1966); *Peak v. Cody*, 113 Ga. App. 674, 149 S.E.2d 519 (1966); *Ekberty v. Bollenbach*, 114 Ga. App. 562, 152 S.E.2d 8 (1966); *Daniel v. Daniel*, 222 Ga. 861, 152 S.E.2d 873 (1967); *Scarborough v. Martha White Mills of Ga., Inc.*, 115 Ga. App. 737, 155 S.E.2d 818 (1967); *Ward v. Ward*, 115 Ga. App. 778, 156 S.E.2d 210 (1967); *Byrd v. Moore Ford Co.*, 116 Ga. App. 292, 157 S.E.2d 41 (1967); *Wilbanks v. State*, 116 Ga. App. 698, 158 S.E.2d 274 (1967); *Aetna Life Ins. Co. v. Greene*, 116 Ga. App. 783, 159 S.E.2d 87 (1967); *Steadham v. State*, 224 Ga. 78, 159 S.E.2d 397 (1968); *Hoover v. State Hwy. Dep't*, 117 Ga. App. 619, 161 S.E.2d 371 (1968); *McKinney v. Schaefer*, 117 Ga. App. 595, 161 S.E.2d 446 (1968); *Bradford v. Lindsey Chevrolet Co.*, 117 Ga. App. 781, 161 S.E.2d 904 (1968); *Insurance Co. of N. Am. v. Jewel*, 118 Ga. App. 599, 164 S.E.2d 846 (1968); *Dowling v. State*, 120 Ga. App. 810, 172 S.E.2d 190 (1969); *Hicks v. State*, 121 Ga. App. 52, 172 S.E.2d 453 (1970); *Stewart v. Church*, 121 Ga. App. 783, 175 S.E.2d 46 (1970); *G.E.C. Corp. v. Southern Fabricators, Inc.*, 122 Ga. App. 452, 177 S.E.2d 497 (1970); *Ellison v. Labor Pool of Am., Inc.*, 228 Ga. 147, 184 S.E.2d 572 (1971); *Housing Auth. v. Marbut Co.*, 229 Ga. 403, 191 S.E.2d 785 (1972); *Petroleum Carrier Corp. v. Jones*, 127 Ga. App. 676, 194 S.E.2d 670 (1972); *Smith v. Rothstein*, 131 Ga. App. 632, 206 S.E.2d 592 (1974); *Burger v. Burgess*, 234 Ga. 388, 216 S.E.2d 294 (1975); *Hughes Motor Co. v. First Nat'l Bank*, 136 Ga. App. 295, 220 S.E.2d 782 (1975); *Dargan, Whittington & Conner, Inc. v. Kitchen*, 138 Ga. App. 414, 226 S.E.2d 482 (1976); *Maheia v. Weeks*, 144 Ga. App. 199, 240 S.E.2d 752 (1977); *Associate Architects, Inc. v. Holland*, 145 Ga. App. 210, 243 S.E.2d 573 (1978); *Justice v. Dunbar*, 241 Ga. 327, 245 S.E.2d 286 (1978); *Garrett v. Heisler*, 149 Ga. App. 240, 253 S.E.2d 863 (1979); *Hardy v. Georgia Power Co.*, 151 Ga. App. 803, 261 S.E.2d 749 (1979); *Hughes v. Newell*, 152 Ga. App. 618, 263 S.E.2d 505 (1979); *City of*

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Atlanta v. Barton, 153 Ga. App. 426, 265 S.E.2d 345 (1980); In re Norris, 154 Ga. App. 173, 267 S.E.2d 788 (1980); Subsequent Injury Trust Fund v. Alterman Foods, Inc., 162 Ga. App. 428, 291 S.E.2d 758 (1982); Underwood v. State ex rel. Price, 164 Ga. App. 109, 296 S.E.2d 365 (1982); In re T.E.D., 169 Ga. App. 401, 312 S.E.2d 864 (1984); Smiway, Inc. v. DOT, 178 Ga. App. 414, 343 S.E.2d 497 (1986); Yates Paving & Grading Co. v. Waters, 181 Ga. App. 537, 352 S.E.2d 791 (1987); Jim Walter Homes, Inc. v. Strickland, 185 Ga. App. 306, 363 S.E.2d 834 (1987); Westmoreland v. State, 192 Ga. App. 173, 384 S.E.2d 249 (1989); McClure v. Gower, 259 Ga. 678, 385 S.E.2d 271 (1989); Ray v. Maxwell, 198 Ga. App. 849, 403 S.E.2d 442 (1991); Stephens v. State, 201 Ga. App. 737, 412 S.E.2d 568 (1991); McFarren v. State, 210 Ga. App. 889, 437 S.E.2d 869 (1993).

Filing of Notice of Appeal

Proper, timely filing of notice of appeal is an absolute requirement to confer jurisdiction upon appellate court. Hardnett v. United States Fid. & Guar. Co., 116 Ga. App. 732, 158 S.E.2d 303 (1967); Jordan v. Caldwell, 229 Ga. 343, 191 S.E.2d 530 (1972).

Burden is upon party desiring to take appeal to file timely notice of appeal. — Burden is on party desiring to take appeal to determine when judgment is filed in trial court, and to file notice of appeal within the 30-day period or within duly authorized extension of the 30-day period. Jordan v. Caldwell, 229 Ga. 343, 191 S.E.2d 530 (1972).

Filing of notice of appeal constitutes entering an appeal. Gibson v. Hodges, 221 Ga. 779, 147 S.E.2d 329 (1966), overruled on other grounds, Gillen v. Bostick, 234 Ga. 308, 215 S.E.2d 676 (1975).

Although notice of appeal is dated prior to entry of judgment intended to be appealed from, it is the filing of notice of appeal which constitutes entering an appeal. Anthony v. Anthony, 120 Ga. App. 261, 170 S.E.2d 273 (1969).

Certificate of clerk is best evidence. — Certificate of clerk, entered upon paper at time of filing, is best evidence of filing as

required by section. Bailey v. Bonaparte, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

As to what constitutes filing within meaning of section. — See Bailey v. Bonaparte, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Appeal or notice of appeal filed other than where law directs. — No other court has jurisdiction to accept or file it, and the filing or attempted filing of it in some other court does not and cannot toll the statutory time for filing. Bailey v. Bonaparte, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Content of Notice of Appeal

Editor's notes. — In light of the similarity of the issues dealt with in the provisions, decisions under former Civil Code 1910, § 6176 and under former Code 1933, §§ 6-912, 6-1202, and 6-1304, as they read prior to revision by Ga. L. 1965, p. 18 are included in the annotations below.

Notice of appeal must specify appealable judgment from which appeal is entered, absent which appeal must be dismissed. Parish v. Georgia R.R. Bank & Trust Co., 115 Ga. App. 540, 154 S.E.2d 750 (1967); Ballew v. State, 225 Ga. 547, 170 S.E.2d 242 (1969).

It is the duty of appellate courts to inquire into their own jurisdiction and dismiss the appeal where appealable judgment or order is not included in notice of appeal. Interstate Fire Ins. Co. v. Chattam, 222 Ga. 436, 150 S.E.2d 618, answer conformed to 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Fact that appealable judgment is shown to exist, or that antecedent interlocutory ruling on motion would be reviewable when enumerated as error on proper designation of appealable judgment, does not cure fatal defect in notice of appeal arising from failure to appeal from such judgment. Ruth v. Kennedy, 117 Ga. App. 632, 161 S.E.2d 410 (1968).

Mere mention of judgment overruling motion to set aside verdict and judgment. — Mere mention in notice of appeal of judgment overruling motion to set aside verdict and judgment does not constitute appeal from final judgment so as to satisfy requirements of this section. Omission in notice of appeal to designate any appealable judgment or order as ruling that entitles appellant to take appeal is fatal. Williams v. Keebler, 222 Ga. 437, 150 S.E.2d 674, answer

conformed to 114 Ga. App. 332, 151 S.E.2d 483 (1966).

Failure to state offense and punishment prescribed. — Deficiencies in defendant's notice of appeal, which did not state the offense and punishment prescribed, did not justify dismissal of the appeal where the notice did provide the specific case number, style, court and date on which the final judgment appealed from was entered and information contained in the notice, considered in conjunction with even a cursory inspection of the record, would make clear the judgment appealed from, as well as the offense and punishment. *Brumby v. State*, 264 Ga. 215, 443 S.E.2d 613 (1994).

Statement that appeal is from jury verdict. — Where notice of appeal states that it is an appeal from a jury verdict, this section does not authorize appellate courts to cause notice of appeal to be perfected by requiring appeal to be amended to show appeal from judgment or to treat appeal from verdict as substantial compliance with the statute. *Interstate Fire Ins. Co. v. Chattam*, 222 Ga. 436, 150 S.E.2d 618, answer conformed to 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Notice of appeal must specify date of order being appealed to avoid dismissal. — Where notice of appeal does not correctly specify date of order being appealed, appeal must be dismissed as notice of appeal does not set forth a judgment, ruling, or order entitling appellant to take appeal within requirements of section. *Hardnett v. United States Fid. & Guar. Co.*, 116 Ga. App. 732, 158 S.E.2d 303 (1967).

Dismissal is proper where there is no judgment of date and description of that appealed from. — Where record discloses there is no judgment of trial court of the date and description of that appealed from, the requirement of this section is not met. The omission is fatal and appeal must be dismissed. *Walker v. Walker*, 222 Ga. 521, 150 S.E.2d 635 (1966); *Bowers v. Gill*, 222 Ga. 529, 150 S.E.2d 653 (1966).

Where notice of appeal stated that appeal was from verdict and judgment dated February 15, and verdict was correctly dated but judgment was dated February 17, notice did not set forth a judgment, ruling, or order entitling appellant to take appeal, nor could there be an appeal from a verdict. *Olson v. Austin Enters., Inc.*, 116 Ga. App. 197, 156 S.E.2d 655 (1967).

Transcript lacking and notice fails to specify whether it will be transmitted. — Where notice of appeal does not specify whether or not transcript of evidence and proceedings is to be transmitted as part of record on appeal as required by section, and record does not contain such transcript, judgment of trial court must be affirmed. *Beasley v. Lamb*, 227 Ga. 266, 180 S.E.2d 240 (1971); *Hageman v. State*, 205 Ga. App. 644, 423 S.E.2d 56 (1992).

Evidence missing from notice of appeal. — Where some portion of the evidence upon which the superior court relied was omitted from the record on appeal, it is assumed that the judgment below is correct. *Bennett v. Executive Benefits, Inc.*, 210 Ga. App. 429, 436 S.E.2d 544 (1993).

Where transcript of evidence to resolve enumerations of error not forwarded, judgment affirmed. — Where the record on appeal contains enumerations of error which can only be resolved by reference to the evidence, and the appellant instructed the clerk to transmit the entire record on appeal and to "omit nothing," but did not order any transcript of evidence to be filed, and, as a result, no transcript was forwarded, the appellate court must affirm the judgment of the trial court. *Tempo Carpet Co. v. Collectible Classic Cars of Ga., Inc.*, 166 Ga. App. 564, 305 S.E.2d 26 (1983).

Where the notice of appeal did not specify that a transcript of evidence and proceedings was to be transmitted as part of the record on appeal, although a portion of the argument and testimony was attached to the record, the Court of Appeals was required to rely on the presumption in favor of the regularity of all proceedings in a court of competent jurisdiction, assume that the evidence was sufficient to support the trial court's summary judgment, and affirm the judgment. *Acker v. Jenkins*, 178 Ga. App. 393, 343 S.E.2d 160 (1986).

Where appellants choose to omit the transcript, and it is necessary for a review of the claimed error, they have failed to meet their burden of showing error. In such a case, the Court of Appeals will assume the evidence is sufficient and affirm. *Hunnicut v. Hunnicutt*, 182 Ga. App. 578, 356 S.E.2d 679 (1987).

No abuse in considering untimely transcript of record. — It was not abuse of

Content of Notice of Appeal (Cont'd)

discretion for the appellate court to consider a transcript of record which was filed after expiration of the statutory period, where the notice of appeal was timely filed and the late filing of the transcript did not cause unreasonable delay. *Hill Aircraft & Leasing Corp. v. Planes, Inc.*, 169 Ga. App. 161, 312 S.E.2d 119 (1983).

Nothing in law prohibits addition of specification to transmit record by amendment. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Failure to include the ruling on the motion for summary judgment in the notice of appeal is of no consequence. *Childers v. Tauber*, 160 Ga. App. 713, 288 S.E.2d 5 (1981).

Where the appellant's notice of appeal states, in essential part, only the following: "Comes now defendant in the above styled cause, and files his Notice of Appeal to the Court of Appeals of Georgia," the notice of appeal does not satisfy the requirements of the Appellate Practice Act and, therefore, must be dismissed. *Fredericks v. State*, 168 Ga. App. 278, 308 S.E.2d 693 (1983).

Failure to designate appealable judgment may be cured by amendment. — Failure to designate an appealable judgment, ruling, or order in the notice of appeal as required by this section can be corrected by amendment in light of § 5-6-48. *Blackwell v. Cantrell*, 169 Ga. App. 795, 315 S.E.2d 29 (1984).

Failure to include dismissal of city as defendant. — Because it is clear from the enumerations of error that plaintiffs sought to appeal from the trial court's dismissal of the city as a defendant, as well as the grant of summary judgment as to other defendants, the failure to include the dismissal of the city in the notice of appeal does not prevent the court's review of the matter. *Rea v. Bunce*, 179 Ga. App. 628, 347 S.E.2d 676 (1986), overruled on other grounds, *Martin v. Department of Pub. Safety*, 357 S.E.2d 569 (Ga. 1987), cert. denied, 484 U.S. 998, 108 S. Ct. 685, 98 L. Ed. 2d 638 (1988).

Notice of appeal must affirmatively and unequivocally show who parties are. — Bill of exceptions (see §§ 5-6-49, 5-6-50) should

on its face affirmatively and unequivocally show who are parties thereto, and abbreviation "et al." when occurring in bill of exceptions after name of party therein designated, cannot be held to include any other person who figured as a party in the trial court. *Lanier v. Bailey*, 206 Ga. 161, 56 S.E.2d 515 (1949) (decided under former Code 1933, § 6-1202).

Plaintiff in error need not name persons who were not parties below. — Ordinarily plaintiff in error is not required to name any person as party to bill of exceptions (see §§ 5-6-49, 5-6-50) who was not party in trial court. *Lassiter v. Bank of Dawson*, 191 Ga. 208, 11 S.E.2d 910 (1940) (decided under former Code 1933, § 6-912).

Omission of essential party from notice of appeal. — Where essential party is not made party in bill of exceptions (see §§ 5-6-49, 5-6-50), nor served with copy thereof, appellate court is without jurisdiction to entertain bill of exceptions; and it is not only its right, but its duty to raise question on its own motion, and if found to be without jurisdiction to entertain bill of exceptions, to dismiss writ of error. *Fitzgerald Cotton Mills v. Murray*, 69 Ga. App. 694, 26 S.E.2d 492 (1943) (decided under former Code 1933, § 6-1202).

Where it appears from record that parties to litigation in court below have not been made parties to appeal, court is without jurisdiction to entertain appeal and will dismiss it. *Malsby v. Shipp*, 177 Ga. 54, 169 S.E. 308 (1933) (decided under former Civil Code 1910, § 6176).

Failure to name essential party may be cured by amendment. — Failure to name essential party as defendant in error will not work dismissal of writ of error, where counsel of record for such party makes timely acknowledgment of service and plaintiff in error tenders amendment to bill of exceptions (see §§ 5-6-49, 5-6-50) to make him party defendant in error. *Howard v. Betts*, 190 Ga. 530, 9 S.E.2d 742 (1940) (decided under former Code 1933, § 6-1304).

Parties to Appeal

Only parties to proceeding below may be parties on appeal. *Samples v. Greene*, 138 Ga. App. 823, 227 S.E.2d 456 (1976).

No person is entitled to prosecute writ of error (see § 5-6-50) for reversal of judg-

ment, unless that person was a party to proceeding in which judgment complained of was rendered. *Gates v. Rutledge*, 151 Ga. App. 844, 261 S.E.2d 757 (1979).

Language of last sentence of section is all-inclusive and mandatory, with no exceptions provided. *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Change of evidentiary posture. — The rule that the language of the last sentence of this Code section is all-inclusive and mandatory, with no exceptions provided, does not apply when the evidentiary posture of the case changes after the initial ruling of the appellate court. *Navistar Int'l Transp. Corp. v. Ogletree*, 199 Ga. App. 699, 405 S.E.2d 884, cert. denied, 200 Ga. App. 896, 405 S.E.2d 884 (1991).

All parties below are parties on appeal. — Once a notice of appeal is timely filed, all

parties to all proceedings in the lower court are parties on appeal, and may, subject to the rules governing practice before the Court of Appeals, participate in the appellate process. *Marsden v. Southeastern Sash & Door Co.*, 193 Ga. App. 597, 388 S.E.2d 730 (1989).

Third-party defendant has status of appellee on appeal from summary judgment. — Where judgment rendered on motion for summary judgment in main case was against defendant, nevertheless, third-party defendant is an interested party and has such interest therein that he has status of appellee in main case, especially as he was served with the appeal. *Burroughs Corp. v. Outside Carpets, Inc.*, 127 Ga. App. 622, 194 S.E.2d 487 (1972).

Cross appeal. — An appellee may institute a cross-appeal against a party other than an appellant. *Centennial Ins. Co. v. Sandner, Inc.*, 259 Ga. 317, 380 S.E.2d 704 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, §§ 298-315.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 298-315.

ALR. — Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 ALR5th 422.

5-6-38. Time of filing notice of appeal; cross appeal; record and transcript for cross appeal; division of costs where cross appeal filed; appeals in capital offense cases for which death penalty is sought.

(a) A notice of appeal shall be filed within 30 days after entry of the appealable decision or judgment complained of; but when a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the notice shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion. In civil cases, the appellee may institute cross appeal by filing notice thereof within 15 days from service of the notice of appeal by the appellant; and the appellee may present for adjudication on the cross appeal all errors or rulings adversely affecting him; and in no case shall the appellee be required to institute an independent appeal on his own right, although the appellee may at his option file an independent appeal. The notice of cross appeal shall set forth the title and docket number of the case, the name of the appellee, the name and address of his attorney, and a designation of any portions of the record or transcript designated for omission by the appellant and which the appellee desires included and shall state that the appellee takes a cross appeal. In all cases where the notice of appeal did not specify that a transcript of evidence and

proceedings was to be transmitted as a part of the record on appeal, the notice of cross appeal shall state whether such transcript is to be filed for inclusion in the record on appeal. A copy of the notice of cross appeal shall be served on other parties of record in the manner prescribed by Code Section 5-6-32.

(b) Where a cross appeal is filed, only one record and, where specified, only one transcript of evidence and proceedings need be prepared and transmitted to the appellate court; but the cross appellant may, at his election, require that such a separate record (and transcript, if required) be transmitted. Where a cross appeal is filed and only one record (and transcript, where required) is sent up, the court shall by order provide for the division of costs therefor between the parties if they are unable to do so by agreement.

(c) Notwithstanding subsection (a) of this Code section, where either the state or the defendant wishes to appeal any judgment, ruling, or order in the pretrial proceedings of a criminal case involving a capital offense for which the death penalty is sought, such appeal shall be brought as provided in Code Section 17-10-35.1. (Ga. L. 1965, p. 18, § 5; Ga. L. 1966, p. 493, § 3; Ga. L. 1968, p. 1072, § 7; Ga. L. 1988, p. 1437, § 2.)

Cross references. — Extension of expiration date, Rules of the Supreme Court of the State of Georgia, Rule 3. Postmark date, Rules of the Supreme Court of the State of Georgia, Rule 4. Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Postmark date, Rules of the Court of Appeals of the State of Georgia, Rule 4. Time of filing briefs and enumerations of error, Rules of the Court of Appeals of the State of Georgia, Rule 14. Time of filing application for interlocutory appeal, Rules of the Court of Appeals of the State of Georgia, Rule 30. Notices of appeal and cross appeal, Rules of the Court of Appeals of the State of Georgia, Rule 33.

Law reviews. — For article discussing Georgia court decision on questions of appellate practice and procedure, see 31 Mercer L. Rev. 1 (1979). For article, "Insuring a Party's Second Chance," see 16 Ga. St. B.J. 177 (1980). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986). For article, "Let's Revise Appellate Procedure in Georgia," see 27 Ga. St. B.J. 135 (1991).

For comment on *Sayers v. Rothberg*, 222 Ga. 626, 151 S.E.2d 445 (1967), see 3 Ga. St. B.J. 489 (1967).

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General Consideration

Editor's notes. — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1933, Code Section 6-902, as it read prior to revision by Ga. L. 1965, p. 18 are included in the annotations for this Code section.

Requirements of section are jurisdictional and failure to comply with them mandates dismissal of appeal. *Thompkins v. State*, 157 Ga. App. 203, 276 S.E.2d 885 (1981).

Appeal dismissed where notice of appeal not timely filed and no extension obtained. *Jenkins v. State*, 120 Ga. App. 318, 170 S.E.2d 435 (1969); *Associated Bldrs. Supply v. Georgia-Pacific Corp.*, 123 Ga. App. 222, 180 S.E.2d 273 (1971); *Carroll v. Holland*, 228 Ga. 649, 187 S.E.2d 531 (1972); *Mayo v. State*, 148 Ga. App. 213, 251 S.E.2d 80 (1978).

Fact that appellant was a fugitive from justice does not excuse noncompliance with section. Noncompliance with section is not remedied simply because appellant is a fugitive from justice until after expiration of time allowed for filing of notice of appeal. *Thompkins v. State*, 157 Ga. App. 203, 276 S.E.2d 885 (1981).

Defendant waives right to appeal by remaining a fugitive during period when he is authorized by statute to file motion for new trial or notice of appeal. *Saleem v. State*, 152 Ga. App. 552, 263 S.E.2d 490 (1979).

Substantial compliance sufficient. — It is sufficient if notification-of-appeal-process provisions are substantially complied with. *Oller v. State*, 187 Ga. App. 818, 371 S.E.2d 455 (1988).

This section specifically authorizes independent appeal. Each party has right to make motion for new trial independently of other and to test ruling thereon. *Brisette v. Munday*, 115 Ga. App. 131, 153 S.E.2d 606 (1967).

Subsection (a) gives an appellant the right to file a cross-appeal, yet specifically preserves an appellant's option to file an independent appeal. *Ammari v. Sohn*, 197 Ga. App. 486, 398 S.E.2d 804 (1990).

Section 9-11-6(e) does not apply to this section, filing time not being predicated on service of notice. *Akin v. Sanders*, 228 Ga. 251, 184 S.E.2d 660 (1971).

Construction where meaning of section is unambiguous. — Where, as in this section, language is plain, unambiguous and positive, and is not capable of two constructions, no court has a right to construe it to mean anything other than what it declares, and this rule, of course, precludes courts from construing it according to what is supposed to be legislative intent. *Bailey v. Bonaparte*, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Word "appellee" as used in section should be liberally construed. — Interpretation of word "appellee," as used in section, to mean only party against whom appeal is taken and who has a particular interest adverse to setting aside judgment appealed is too restrictive because a liberal construction of section comports with policies of this article, enhances efficient administration of justice, and avoids multiplicity of appeals. *Executive Jet Sales, Inc. v. Jet Am., Inc.*, 242 Ga. 307, 248 S.E.2d 676 (1978).

Appellee is party in cause against whom appeal is taken. *Glennville Wood Preserving Co. v. Riddlespur*, 156 Ga. App. 578, 276 S.E.2d 248 (1980), aff'd in part and rev'd in part on other grounds, *Centennial Ins. Co. v. Sandner, Inc.*, 259 Ga. 317, 380 S.E.2d 704 (1989).

Appellee becomes such when appeal is taken against him by appellant. *Glennville Wood Preserving Co. v. Riddlespur*, 156 Ga. App. 578, 276 S.E.2d 248 (1980), aff'd in part and rev'd in part on other grounds, *Centennial Ins. Co. v. Sandner, Inc.*, 259 Ga. 317, 380 S.E.2d 704 (1989).

General Consideration (Cont'd)

Words "otherwise finally disposing of" can mean only dismissal or withdrawal of motion. *Golden v. Credico, Inc.*, 124 Ga. App. 700, 185 S.E.2d 578 (1971).

Disposition of appeal not res judicata regarding issues raised by subsequent motion for new trial. — Where notice of appeal is filed before filing of extraordinary motion for new trial, disposition of appeal will not be res judicata as to issues raised by subsequently filed motion. *Music v. State*, 244 Ga. 832, 262 S.E.2d 128 (1979).

Unappealed sentence may not be later attacked. — Where a sentence is not appealed within 30 days of its rendition, it may not be later attacked. *Beeks v. State*, 169 Ga. App. 499, 313 S.E.2d 760 (1984).

Extraordinary motion for new trial. — Extraordinary motion for new trial was improper where it was based only on the general grounds and various evidentiary rulings made during the course of the trial, these are matters which could and should have been discovered and raised in a timely filed ordinary motion for new trial. *Bohannon v. State*, 203 Ga. App. 783, 417 S.E.2d 679 (1992).

Addressing of errors in first trial where new trial granted. — Where the trial court grants a motion for a directed verdict, then grants a motion for a new trial, ruling that the directed verdict motion was improvidently granted, and a second trial is conducted, followed by an appeal by the losing party, the appellate court is concerned only with the trial court's orders in the second trial and cannot address any enumerations of error as to the final orders of the trial court in the previous trial, as these judgments were not timely appealed. *Vanguard Ins. Co. v. Beasley*, 167 Ga. App. 625, 307 S.E.2d 56 (1983).

Time is a jurisdictional element of appeal. *Wren v. Josey*, 97 Ga. App. 593, 103 S.E.2d 745 (1958) (decided under former Code 1933, § 6-902, as it read prior to the revision by Ga. L. 1965, p. 18).

Illness and death of sole counsel for non-resident litigant does not excuse noncompliance with section. — Not even illness and death of sole counsel for nonresident litigant, unaware of this fact, affords Supreme Court grounds for hearing and determining

writ of error (see §§ 5-6-49, 5-6-50) not sued out within time required by section. *Wren v. Josey*, 97 Ga. App. 593, 103 S.E.2d 745 (1958) (decided under former Code 1933, § 6-902, as it read prior to the revision by Ga. L. 1965, p. 18).

Record controls where it conflicts with notice of appeal as to date motion is overruled. — Where there is a conflict between recitals in bill of exceptions (see §§ 5-6-49, 5-6-50) and record as to date motion for new trial was overruled, the record controls. *Malone v. Evans*, 74 Ga. App. 34, 38 S.E.2d 816 (1946) (decided under former Code 1933, § 6-902, as it read prior to the revision by Ga. L. 1965, p. 18).

Cited in *Close v. Walker Land Corp.*, 221 Ga. 329, 145 S.E.2d 245 (1965); *Stanford v. Evans, Reed & Williams*, 221 Ga. 331, 145 S.E.2d 504 (1965); *Williams v. State*, 112 Ga. App. 566, 145 S.E.2d 765 (1965); *Rhett v. State*, 112 Ga. App. 567, 145 S.E.2d 823 (1965); *Banks v. Banks*, 221 Ga. 626, 146 S.E.2d 636 (1966); *Mobley v. State*, 221 Ga. 716, 146 S.E.2d 735 (1966); *Taylor v. Haygood*, 113 Ga. App. 30, 147 S.E.2d 48 (1966); *Smith v. Smith*, 113 Ga. App. 111, 147 S.E.2d 466 (1966); *Birdwell v. Pippen*, 113 Ga. App. 202, 147 S.E.2d 673 (1966); *Seaton v. Redisco, Inc.*, 113 Ga. App. 256, 147 S.E.2d 828 (1966); *Lanier v. Fuller*, 113 Ga. App. 234, 147 S.E.2d 875 (1966); *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55 (1966); *Bivens v. Todd*, 222 Ga. 84, 148 S.E.2d 424 (1966); *Black v. Miller*, 114 Ga. App. 208, 150 S.E.2d 466 (1966); *Walker v. Walker*, 222 Ga. 521, 150 S.E.2d 635 (1966); *Sayers v. Rothberg*, 222 Ga. 626, 151 S.E.2d 445 (1966); *Kahn v. Graper*, 114 Ga. App. 572, 152 S.E.2d 10 (1966); *Atlanta Funtown, Inc. v. Crouch*, 114 Ga. App. 702, 152 S.E.2d 583 (1966); *Daniel v. Daniel*, 222 Ga. 861, 152 S.E.2d 873 (1967); *Wiggin v. Wiggin*, 223 Ga. 63, 153 S.E.2d 306 (1967); *Hicks v. Maple Valley Corp.*, 223 Ga. 69, 153 S.E.2d 547 (1967); *Langdale Co. v. Day*, 115 Ga. App. 30, 153 S.E.2d 671 (1967); *Condon v. Thornton*, 115 Ga. App. 129, 153 S.E.2d 726 (1967); *Turner v. Bogle*, 115 Ga. App. 710, 155 S.E.2d 667 (1967); *Bailey v. State*, 224 Ga. App. 48, 159 S.E.2d 286 (1968); *Mixon v. Hall*, 117 Ga. App. 626, 161 S.E.2d 429 (1968); *Maddox v. Maddox*, 224 Ga. 313, 161 S.E.2d 870 (1968); *Collins v. Southside Lumber Co.*, 118 Ga. App. 342, 163 S.E.2d

755 (1968); *Lamas Co. v. Baldwin*, 118 Ga. App. 437, 164 S.E.2d 236 (1968); *Daniels v. Allen*, 118 Ga. App. 722, 165 S.E.2d 449 (1968); *Spadea v. Spadea*, 225 Ga. 80, 165 S.E.2d 836 (1969); *Smith v. Smith*, 225 Ga. 241, 167 S.E.2d 597 (1969); *Shepherd v. Shepherd*, 225 Ga. 455, 169 S.E.2d 314 (1969); *Atlanta Gas Light Co. v. Roberson*, 120 Ga. App. 361, 170 S.E.2d 587 (1969); *Genins v. Genins*, 226 Ga. 70, 172 S.E.2d 416 (1970); *Campbell v. Carroll*, 121 Ga. App. 497, 174 S.E.2d 375 (1970); *State Hwy. Dep't v. Sullivan*, 121 Ga. App. 767, 175 S.E.2d 152 (1970); *Merchants & Mfrs. Transf. Co. v. Auto Rental & Leasing, Inc.*, 121 Ga. App. 729, 175 S.E.2d 156 (1970); *Hughes v. State*, 226 Ga. 721, 177 S.E.2d 243 (1970); *G.E.C. Corp. v. Southern Fabricators, Inc.*, 122 Ga. App. 452, 177 S.E.2d 497 (1970); *Alf v. Alf*, 226 Ga. 880, 178 S.E.2d 187 (1970); *Petty v. Petty*, 227 Ga. 521, 181 S.E.2d 859 (1971); *Kokotis v. Lightsey*, 227 Ga. 800, 183 S.E.2d 383 (1971); *Chaffin v. Stynchcombe*, 228 Ga. 582, 187 S.E.2d 140 (1972); *Moss v. Strother Ford, Inc.*, 125 Ga. App. 347, 187 S.E.2d 570 (1972); *Wood v. Atkinson*, 229 Ga. 179, 190 S.E.2d 46 (1972); *McDonald v. Rogers*, 229 Ga. 369, 191 S.E.2d 844 (1972); *City of Harrison v. Harrison*, 229 Ga. 692, 194 S.E.2d 87 (1972); *Model Cleaners & Laundry, Inc. v. Per Corp.*, 127 Ga. App. 559, 194 S.E.2d 258 (1972); *Shaddrix v. Womack*, 231 Ga. 628, 203 S.E.2d 225 (1974); *Irby v. Christian*, 130 Ga. App. 375, 203 S.E.2d 284 (1973); *Wilson v. City of Waycross*, 130 Ga. App. 253, 203 S.E.2d 301 (1973); *A & D Barrel & Drum Co. v. Fuqua*, 132 Ga. App. 827, 209 S.E.2d 272 (1974); *Thomas v. Allstate Ins. Co.*, 133 Ga. App. 193, 210 S.E.2d 361 (1974); *Flintwood, Inc. v. Johnson*, 134 Ga. App. 78, 213 S.E.2d 180 (1975); *Thibadeau v. Henley*, 233 Ga. 884, 213 S.E.2d 657 (1975); *Fastenberg v. Associated Distribs., Inc.*, 134 Ga. App. 213, 213 S.E.2d 898 (1975); *Gresham v. John Roth Assocs.*, 134 Ga. App. 691, 215 S.E.2d 538 (1975); *In re Thomas*, 134 Ga. App. 728, 215 S.E.2d 735 (1975); *Curry v. Hopper*, 234 Ga. 642, 217 S.E.2d 155 (1975); *Horton v. Horton*, 235 Ga. 227, 219 S.E.2d 88 (1975); *Shannon Co. v. Heneveld*, 235 Ga. 635, 221 S.E.2d 200 (1975); *Miller v. Georgia Real Estate Comm'n*, 136 Ga. App. 718, 222 S.E.2d 183 (1975); *Venable v. Block*, 138 Ga. App. 215, 225 S.E.2d 755 (1976); *Dargan,*

Whittington & Conner, Inc. v. Kitchen, 138 Ga. App. 414, 226 S.E.2d 482 (1976); *Davis v. Davis*, 139 Ga. App. 599, 229 S.E.2d 81 (1976); *Beatty v. Underground Atlanta*, 237 Ga. 844, 229 S.E.2d 615 (1976); *Rollins Communications, Inc. v. Henderson, Few & Co.*, 140 Ga. App. 504, 231 S.E.2d 412 (1976); *Smith v. State*, 140 Ga. App. 492, 231 S.E.2d 493 (1976); *DOT v. Knight*, 238 Ga. 225, 232 S.E.2d 72 (1977); *McEver v. State*, 141 Ga. App. 429, 233 S.E.2d 504 (1977); *Heller v. Board of Comm'rs*, 238 Ga. 501, 233 S.E.2d 761 (1977); *Beatty v. Underground Atlanta, Inc.*, 141 Ga. App. 542, 233 S.E.2d 886 (1977); *Smith v. State*, 238 Ga. 655, 235 S.E.2d 375 (1977); *Pugmire Lincoln Mercury, Inc. v. Sorrells*, 142 Ga. App. 444, 236 S.E.2d 113 (1977); *Deroller v. Powell*, 144 Ga. App. 585, 241 S.E.2d 469 (1978); *Love v. State*, 144 Ga. App. 728, 242 S.E.2d 278 (1978); *Miller v. State*, 146 Ga. App. 7, 245 S.E.2d 442 (1978); *United States Fire Ins. Co. v. Farris*, 146 Ga. App. 177, 245 S.E.2d 868 (1978); *Hartley v. State*, 146 Ga. App. 658, 247 S.E.2d 126 (1978); *Bozard v. J.A. Jones Constr. Co.*, 146 Ga. App. 877, 247 S.E.2d 605 (1978); *Kiplinger v. Kiplinger*, 242 Ga. 465, 249 S.E.2d 254 (1978); *Moski v. Public Serv. Comm'n*, 148 Ga. App. 28, 251 S.E.2d 9 (1978); *Jenkins v. State*, 149 Ga. App. 401, 254 S.E.2d 914 (1978); *Black v. Cotton States Ins. Co.*, 149 Ga. App. 71, 253 S.E.2d 565 (1979); *Garrett v. Heisler*, 149 Ga. App. 240, 253 S.E.2d 863 (1979); *Jones v. Monroe Nursing Home, Inc.*, 149 Ga. App. 582, 254 S.E.2d 902 (1979); *Canup v. State*, 150 Ga. App. 794, 258 S.E.2d 907 (1979); *Shipman v. Horizon Corp.*, 151 Ga. App. 242, 259 S.E.2d 221 (1979); *Hardy v. Georgia Power Co.*, 151 Ga. App. 805, 261 S.E.2d 748 (1979); *Southern Disct. Co. v. Ector*, 152 Ga. App. 244, 262 S.E.2d 457 (1979); *Moore v. Reeves*, 153 Ga. App. 517, 266 S.E.2d 810 (1980); *Bergen v. Martindale-Hubbell, Inc.*, 245 Ga. 742, 267 S.E.2d 10 (1980); *Oxley v. Little Switz. Brewing Co.*, 154 Ga. App. 36, 267 S.E.2d 460 (1980); *Bennett v. Caton*, 154 Ga. App. 515, 268 S.E.2d 786 (1980); *Parker v. State*, 156 Ga. App. 299, 274 S.E.2d 694 (1980); *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980); *Cook v. State*, 157 Ga. App. 23, 276 S.E.2d 84 (1981); *Kaplan v. City of Atlanta*, 158 Ga. App. 58, 279 S.E.2d 307 (1981); *Village Centers, Inc. v. DeKalb*

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County, 248 Ga. App. 177, 281 S.E.2d 522 (1981); Black v. Georgia Power Co., 158 Ga. App. 620, 281 S.E.2d 639 (1981); Hall v. Hall, 159 Ga. App. 52, 282 S.E.2d 699 (1981); Washington v. State, 158 Ga. App. 829, 282 S.E.2d 776 (1981); Pessolano v. George R. Price & Assocs., 159 Ga. App. 340, 283 S.E.2d 317 (1981); Austin v. Carter, 248 Ga. App. 775, 285 S.E.2d 542 (1982); Graves v. American Alloy Steel, Inc., 160 Ga. App. 378, 287 S.E.2d 94 (1981); Joiner v. Perkerson, 160 Ga. App. 343, 287 S.E.2d 327 (1981); Ross v. State, 160 Ga. App. 380, 287 S.E.2d 337 (1981); Godfrey v. Kirk, 161 Ga. App. 474, 288 S.E.2d 301 (1982); Hooks v. Gates, 162 Ga. App. 434, 291 S.E.2d 569 (1982); Shepherd v. Metropolitan Property & Liab. Ins. Co., 163 Ga. App. 650, 294 S.E.2d 638 (1982); Freeman v. Gold & White, Inc., 163 Ga. App. 467, 294 S.E.2d 718 (1982); Marshall Erdman & Assocs. v. Georgia State Bd. for Examination, Qualification & Registration of Architects, 164 Ga. App. 283, 296 S.E.2d 219 (1982); Ponder v. State, 164 Ga. App. 574, 298 S.E.2d 561 (1982); Georgia Dep't of Labor v. Sims, 164 Ga. App. 856, 298 S.E.2d 562 (1982); Chadwick v. Frix, 165 Ga. App. 20, 299 S.E.2d 93 (1983); Sayre v. State, 165 Ga. App. 225, 299 S.E.2d 749 (1983); Officers Int'l Corp. v. Interstate N. Assocs., 166 Ga. App. 93, 303 S.E.2d 292 (1983); Scott v. Liberty Mut. Ins. Co., 168 Ga. App. 815, 310 S.E.2d 772 (1983); Saylor v. Vasconez, 169 Ga. App. 210, 312 S.E.2d 199 (1983); Joseph v. Joseph, 169 Ga. App. 894, 315 S.E.2d 470 (1984); Abney v. State, 170 Ga. App. 265, 316 S.E.2d 845 (1984); State v. Cook, 172 Ga. App. 433, 323 S.E.2d 634 (1984); Savage v. Newsome, 173 Ga. App. 271, 326 S.E.2d 5 (1985); Crimminger v. Habif, 174 Ga. App. 440, 330 S.E.2d 164 (1985); Whitton v. State, 174 Ga. App. 634, 331 S.E.2d 10 (1985); Henry v. State, 174 Ga. App. 687, 331 S.E.2d 66 (1985); Melton v. State, 177 Ga. App. 134, 338 S.E.2d 701 (1985); Carpets 'N Colors, Inc. v. Hollycraft Carpets, Inc., 177 Ga. App. 534, 339 S.E.2d 793 (1986); International Indem. Co. v. Smith, 178 Ga. App. 4, 342 S.E.2d 4 (1986); City of Atlanta v. Brown, 180 Ga. App. 513, 350 S.E.2d 55 (1986); Hight v. Burden, 180 Ga. App. 716, 350 S.E.2d 471 (1986); Sikes v. State, 181 Ga. App. 210, 351 S.E.2d 732 (1986); Williamson v. State, 182

Ga. App. 49, 354 S.E.2d 868 (1987); Melton v. J.M. Kenith Co., 182 Ga. App. 184, 355 S.E.2d 115 (1987); Rimes v. State, 182 Ga. App. 721, 356 S.E.2d 897 (1987); Attwell v. Lane Co., 182 Ga. App. 813, 357 S.E.2d 142 (1987); Martin v. State, 185 Ga. App. 145, 363 S.E.2d 765 (1988); Robinson v. Kemp Motor Sales, Inc., 185 Ga. App. 492, 364 S.E.2d 623 (1988); Willis v. State, 186 Ga. App. 197, 366 S.E.2d 778 (1988); Booker v. Amdur, 186 Ga. App. 276, 367 S.E.2d 94 (1988); In re Booker, 186 Ga. App. 614, 367 S.E.2d 850 (1988); Hargrove v. Phillips, 186 Ga. App. 525, 368 S.E.2d 123 (1988); McKinney v. State, 187 Ga. App. 702, 371 S.E.2d 196 (1988); In re Doe, 188 Ga. App. 255, 372 S.E.2d 822 (1988); Aldridge v. State, 188 Ga. App. 729, 374 S.E.2d 223 (1988); Shouse v. State, 189 Ga. App. 531, 376 S.E.2d 911 (1988); Gully v. Glover, 190 Ga. App. 238, 378 S.E.2d 411 (1989); Paytee v. State, 190 Ga. App. 291, 380 S.E.2d 92 (1989); Friedman v. Friedman, 259 Ga. App. 530, 384 S.E.2d 641 (1989); Jones v. Perkins, 192 Ga. App. 343, 384 S.E.2d 927 (1989); McClure v. Gower, 259 Ga. App. 678, 385 S.E.2d 271 (1989); All Phase Elec. Supply Co. v. Foster & Cooper, Inc., 193 Ga. App. 232, 387 S.E.2d 429 (1989); Southern Farm Bureau Life Ins. Co. v. Douglas, 193 Ga. App. 476, 388 S.E.2d 67 (1989); Clay v. State, 194 Ga. App. 354, 391 S.E.2d 143 (1990); Atlanta Obstetrics & Gynecology Group v. Abelson, 195 Ga. App. 274, 392 S.E.2d 916 (1990); City of Fairburn v. Cook, 195 Ga. App. 265, 393 S.E.2d 70 (1990); Baker v. State, 195 Ga. App. 424, 394 S.E.2d 801 (1990); Moore v. Sinclair, 196 Ga. App. 667, 396 S.E.2d 557 (1990); Dollar v. Department of Human Resources, 196 Ga. App. 698, 396 S.E.2d 913 (1990); Auld v. Weaver, 196 Ga. App. 782, 397 S.E.2d 51 (1990); Precise v. City of Rossville, 196 Ga. App. 870, 397 S.E.2d 133 (1990); O'Kelly v. State, 196 Ga. App. 860, 397 S.E.2d 197 (1990); Walker v. State, 197 Ga. App. 265, 398 S.E.2d 217 (1990); Lytle v. State, 197 Ga. App. 462, 398 S.E.2d 733 (1990); Ferguson v. State, 197 Ga. App. 443, 398 S.E.2d 738 (1990); Jones v. McCoy, 197 Ga. App. 430, 398 S.E.2d 786 (1990); Stevens v. McCarty, 198 Ga. App. 412, 401 S.E.2d 605 (1991); Austin v. State, 199 Ga. App. 54, 404 S.E.2d 477 (1991); Pinkney v. Union, 199 Ga. App. 529, 405 S.E.2d 521 (1991); Stirling v. State, 199 Ga. App. 877, 406 S.E.2d 282 (1991);

Bank S. v. Roswell Jeep Eagle, Inc., 200 Ga. App. 489, 408 S.E.2d 503 (1991); *Walker v. State*, 201 Ga. App. 774, 412 S.E.2d 291 (1991); *Southern Gen. Ins. Co. v. Buck*, 202 Ga. App. 103, 413 S.E.2d 481 (1991); *Hipple v. Brick*, 202 Ga. App. 571, 415 S.E.2d 182 (1992); *Watson v. State*, 202 Ga. App. 667, 415 S.E.2d 306 (1992); *Nodvin v. West*, 204 Ga. App. 280, 419 S.E.2d 120 (1992); *Wal-Mart Stores, Inc. v. Curry*, 206 Ga. App. 775, 426 S.E.2d 581 (1992); *Vance v. Lomas Mtg. USA, Inc.*, 263 Ga. 33, 426 S.E.2d 873 (1993); *Anaya v. Brooks Auto Parts, Inc.*, 208 Ga. App. 491, 430 S.E.2d 825 (1993); *Calvert Enter., Inc. v. American Medical Int'l, Inc.*, 208 Ga. App. 525, 431 S.E.2d 132 (1993); *Hubbard v. State*, 208 Ga. App. 719, 431 S.E.2d 479 (1993); *Griffin v. Loper*, 209 Ga. App. 504, 433 S.E.2d 653 (1993).

Appealable Judgments or Orders

Notice of appeal must specify an appealable judgment from which appeal is entered, absent which appeal must be dismissed. *Parish v. Georgia R.R. Bank & Trust Co.*, 115 Ga. App. 540, 154 S.E.2d 750 (1967).

Judgment cannot be considered appealable until actually entered. — Court of Appeals lacked jurisdiction to consider enumerations of error arising from breach of contract claim, since the jury's verdict on the claim was never reduced to judgment because of plaintiff's election to have judgment entered on his theory of fraud. *Miner v. Harrison*, 205 Ga. App. 523, 422 S.E.2d 899, cert. denied, 205 Ga. App. 900, 422 S.E.2d 899 (1992).

A verdict is not an appealable decision or judgment within purview of section. *Williams v. Keebler*, 222 Ga. 437, 150 S.E.2d 674, answer conformed to 114 Ga. App. 332, 151 S.E.2d 483 (1966).

Judgment, and not verdict, is the appealable decision. *Herrington v. Herrington*, 230 Ga. 94, 195 S.E.2d 654 (1973), overruled on other grounds, *Gillen v. Bostick*, 234 Ga. 308, 215 S.E.2d 676 (1975).

Judgment entered on consent verdict or guilty plea. — Timely-filed direct appeal will lie from judgment entered on consent verdict or guilty plea. *Neal v. State*, 232 Ga. 96, 205 S.E.2d 284 (1974).

Dismissal of motion for new trial is a final disposition and does not require appellate court to dismiss appeal of dismissal. *Gold*

Kist, Inc. v. Stokes, 135 Ga. App. 382, 217 S.E.2d 352, rev'd on other grounds, 235 Ga. 643, 221 S.E.2d 49 (1975).

Order sustaining motion to dismiss on merits and providing self-executing dismissal provision. — Order sustaining general demurrer (now motion to dismiss) on merits and providing self-executing dismissal provision is a final order. If no notice of appeal is filed beforehand, case is not automatically dismissed until expiration of time allowed for amendments and an appeal within 30 days after such date is timely. *Chambers v. Peacock Constr. Co.*, 115 Ga. App. 670, 155 S.E.2d 704, aff'd, 223 Ga. 515, 156 S.E.2d 348 (1967).

An oral order is not final nor appealable until and unless it is reduced to writing, signed by the judge, and filed with the clerk. This constitutes "entry." And it is only an "entered" decision or judgment which is appealable. *Sharp v. State*, 183 Ga. App. 641, 360 S.E.2d 50 (1987).

Order affecting earlier final judgment. — Trial court's corrective action in clarifying an omission as to post-trial interest in its earlier partial summary judgment, which had been certified as final, constituted a final order which was directly appealable. *Nodvin v. West*, 197 Ga. App. 92, 397 S.E.2d 581 (1990).

Judgment not final as to all parties. — In the absence of an express determination and express direction pursuant to § 9-11-54(b), the denial of a motion for a new trial as to fewer than all the parties against whom a new trial has actually been sought is not itself a final judgment, does not otherwise terminate the action even as to those in whose favor judgment has previously been entered, and is subject to revision at any time prior to the entry of a judgment as to all parties. Accordingly, the denial of such a motion is not an order "otherwise finally disposing of the motion" so as to trigger the 30-day period established by subsection (a) of this section for the filing of a notice appeal, unless and until there has been compliance with § 9-11-54(b). *Crumbley v. Wyant*, 183 Ga. App. 802, 360 S.E.2d 276, cert. denied, 183 Ga. App. 905, 360 S.E.2d 276 (1987).

Jurisdiction

Timely filing of notice, delaying motion or grant of extension necessary. — When

Jurisdiction (Cont'd)

30-day period after entry of judgment on verdict expires and no notice of appeal has been filed, no extension of time therefor obtained, nor motion filed which would toll time for filing of notice of appeal, judgment, is unappealed from and becomes law of case. *Venable v. Block*, 141 Ga. App. 523, 233 S.E.2d 878 (1977).

For Court of Appeals to acquire jurisdiction over case, notice of appeal must be filed within 30 days of entry of judgment appealed from, unless extension is granted upon proper application to trial court, and motion for reconsideration of order granting summary judgment and dismissing counterclaim does not extend deadline for filing notice of appeal from that order. *Peppers House Restaurant, Inc. v. Siefferman*, 156 Ga. App. 114, 274 S.E.2d 43 (1980).

Proper, timely filing of notice of appeal is absolute requirement to confer appellate jurisdiction. *Jordan v. Caldwell*, 229 Ga. 343, 191 S.E.2d 530 (1972); *Gillen v. Bostick*, 234 Ga. 308, 215 S.E.2d 676 (1975); *Camp v. Hamrick*, 139 Ga. App. 61, 228 S.E.2d 288 (1976); *May v. May*, 139 Ga. App. 672, 229 S.E.2d 145 (1976); *Patterson v. Professional Resources, Inc.*, 140 Ga. App. 315, 231 S.E.2d 88 (1976); *Smith v. Forrester*, 145 Ga. App. 281, 243 S.E.2d 575, cert. denied, 439 U.S. 863, 99 S. Ct. 185, 58 L. Ed. 2d 172 (1978); *Hester v. State*, 242 Ga. 173, 249 S.E.2d 547 (1978); *Albert v. Bryan*, 150 Ga. App. 649, 258 S.E.2d 300 (1979); *Freeman v. State*, 154 Ga. App. 344, 268 S.E.2d 727 (1980); *Dunn v. State*, 156 Ga. App. 483, 274 S.E.2d 828 (1980); *Strauss v. Peachtree Assocs.*, 156 Ga. App. 536, 275 S.E.2d 90 (1980); *Grant v. State*, 157 Ga. App. 390, 278 S.E.2d 53 (1981); *Long v. Long*, 247 Ga. 624, 278 S.E.2d 370 (1981); *Sands v. Lamar Properties, Inc.*, 159 Ga. App. 718, 285 S.E.2d 24 (1981); *Hose v. State*, 159 Ga. App. 842, 285 S.E.2d 588 (1981); *Hunter v. Big Canoe Corp.*, 162 Ga. App. 629, 291 S.E.2d 726 (1982); *Moncrief v. Tara Apts., Ltd.*, 162 Ga. App. 695, 293 S.E.2d 352 (1982); *Boothe v. State*, 178 Ga. App. 22, 342 S.E.2d 9 (1986); *Knox v. State*, 180 Ga. App. 564, 349 S.E.2d 753 (1986); *Banks v. Green*, 205 Ga. App. 589, 423 S.E.2d 31 (1992), cert. denied, 205 Ga. App. 899, 423 S.E.2d 31, U.S. , 113 S. Ct. 2419, 124 L. Ed. 2d 642 (1992).

Where notice of appeal is given more than 30 days after entry of judgment, judgment is not reviewable and appeal must be dismissed. *Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos.*, 116 Ga. App. 503, 157 S.E.2d 767 (1967).

Unless jurisdiction of appellate court is invoked within 30-day period following filing of judgment in trial court by party to case, then appellate court is without jurisdiction to review judgment of trial court; and result is that judgment of trial court stands as rendered. *Patterson v. Professional Resources, Inc.*, 140 Ga. App. 315, 231 S.E.2d 88 (1976).

The timely filing of a notice of appeal is essential to confer jurisdiction upon the appellate court. *Bowen v. Clayton County Hosp. Auth.*, 160 Ga. App. 809, 288 S.E.2d 232 (1982); *Mobley v. State*, 162 Ga. App. 23, 288 S.E.2d 702 (1982); *Raymond v. State*, 162 Ga. App. 493, 292 S.E.2d 196 (1982).

An appellate court is without jurisdiction where the notice of appeal is not timely filed in accordance with the statutory requirements of this section. *McNeese v. State*, 167 Ga. App. 770, 307 S.E.2d 303 (1983).

The Court of Appeals is without jurisdiction where the notice of appeal is not timely filed in accordance with the statutory requirements. *Westerfield v. State*, 169 Ga. App. 510, 313 S.E.2d 768 (1984).

Although an order denying a motion to set aside summary judgment orders is an appealable judgment, notice of appeal filed a minimum of 33 days after the filing of the order denying the motion to vacate and set aside is untimely and confers no jurisdiction upon the Court of Appeals. *Quarterman v. Quarterman*, 170 Ga. App. 376, 317 S.E.2d 206 (1983).

Where notice of appeal was filed approximately two and one-half months after the entry of the orders granting motions for summary judgments and where no motions for new trial, in arrest of judgment, or judgment n.o.v. were filed, the Court of Appeals had no jurisdiction to consider those orders. *Quarterman v. Quarterman*, 170 Ga. App. 376, 317 S.E.2d 206 (1983).

Although counsel did not know order sought to be appealed had been filed the rule still applies. *Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc.*, 147 Ga. App. 590, 249 S.E.2d 631 (1978).

Untimeliness sought to be attributed to clerk or court. — This rule obtains even where untimeliness is sought to be attributed to clerk's docket sheet, to misstatements of clerk of court, or, to the court. *Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc.*, 147 Ga. App. 590, 249 S.E.2d 631 (1978).

Prerequisite to Supreme Court jurisdiction over appeal. — Unless notice of appeal is timely filed in accordance with section, Supreme Court does not have jurisdiction to review original adverse judgment on appeal. *Neal v. State*, 232 Ga. 96, 205 S.E.2d 284 (1974).

Filing of notice of appeal within statutory period or securing of extension during such period is absolutely essential, to enable Supreme Court to consider case on merits. *Kennedy v. Brown*, 239 Ga. 286, 236 S.E.2d 632 (1977).

Appeal or notice of appeal filed anywhere other than where law directs. No other court has jurisdiction to accept or file it, and filing or attempted filing of it in some other court does not and cannot toll statutory time for filing. *Bailey v. Bonaparte*, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Immaterial amendment will not confer jurisdiction where earlier appeal dismissed for noncompliance. — Where notice of appeal is not filed according to mandate of section, if appellate court dismisses appeal for this reason, amendment which is not a material one will not give jurisdiction to entertain or rule on new motion to dismiss. *City Stores Co. v. Henderson*, 116 Ga. App. 114, 156 S.E.2d 818 (1967).

Appellate court without jurisdiction. — Unless the jurisdiction of the appellate court is invoked within the 30-day period following the filing of the judgment in the trial court by a party to the case, then the appellate court is without jurisdiction to review the judgment of the trial court; and the result is that the judgment of the trial court stands as rendered. *Jarrard v. Copeland*, 205 Ga. App. 20, 421 S.E.2d 84 (1992).

Appellate court lacks jurisdiction to perfect untimely notice of appeal. — If notice of appeal is not filed within 30 days from judgment, ruling or order entitling appellant to take appeal, Court of Appeals has no jurisdiction from outset and can do nothing to perfect litigant's attempt to confer juris-

diction by amendment to notice of appeal. *Hardnett v. United States Fid. & Guar. Co.*, 116 Ga. App. 732, 158 S.E.2d 303 (1967).

It is not necessary that judgment be attacked by a method provided in § 9-11-60, as any final judgment may be timely appealed. *Hiscock v. Hiscock*, 227 Ga. 329, 180 S.E.2d 730 (1971).

Motion for reconsideration of new trial denial. — The Supreme Court did not lack jurisdiction over a case because the defendant had pending in the trial court a motion for reconsideration of the denial of his motion for new trial. When the trial court denied the motion for new trial, the case became ripe for appeal. *Holiday v. State*, 258 Ga. 393, 369 S.E.2d 241, cert. denied, 488 U.S. 934, 109 S. Ct. 329, 102 L. Ed. 2d 346 (1988).

Where appellee failed to file cross-appeal. — Where a case on appeal in which the appellee filed a motion to remand the case, after a decision on the merits has been reached, and where appellee wanted to remand the case for a hearing on appellant's motion to proceed in forma pauperis and contending that the motion was filed and ruled upon without appellee having had an opportunity to respond in opposition, the matter was not properly before the appellate court, since appellee had not filed a cross-appeal as required by this Code section. *Selfridge v. Morrison Cafeteria Co.*, 192 Ga. App. 469, 385 S.E.2d 137, cert. denied, 192 Ga. App. 903, 385 S.E.2d 137 (1989).

Filing

1. In General

Filing of notice of appeal serves to supersede judgment, and while on appeal, trial court is without authority to modify such judgment. *Dalton Am. Truck Stop, Inc. v. ADBE Distrib. Co.*, 146 Ga. App. 8, 245 S.E.2d 346 (1978).

Burden is on party desiring to take appeal. — Burden is on party desiring to take appeal to determine when judgment is filed in trial court, and to file his notice of appeal within 30-day period or within duly authorized extension of 30-day period. *Jordan v. Caldwell*, 229 Ga. 343, 191 S.E.2d 530 (1972); *Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc.*, 147 Ga. App. 590, 249 S.E.2d 631 (1978).

Filing (Cont'd)**1. In General (Cont'd)**

Burden is upon party taking appeal to file within required 30 day period. *Moncrief v. Tara Apts., Ltd.*, 162 Ga. App. 695, 293 S.E.2d 352 (1982).

Burden is not satisfied by relying on postal delivery but may be satisfied only by depositing notice of appeal with clerk within appropriate time frame. *Moncrief v. Tara Apts., Ltd.*, 162 Ga. App. 695, 293 S.E.2d 352 (1982).

Burden is on appellant to ascertain whether clerk's office is open for filing of notice of appeal on specific date. *Camp v. Hamrick*, 139 Ga. App. 61, 228 S.E.2d 288 (1976); *Blumenau v. Citizens & S. Nat'l Bank*, 139 Ga. App. 188, 228 S.E.2d 302 (1976).

Judgment cannot be considered appealable until it is actually entered; therefore, where notice of appeal is filed before entry of judgment, appeal must be dismissed. *Cunningham v. State*, 131 Ga. App. 133, 205 S.E.2d 899, rev'd on other grounds, 232 Ga. 416, 207 S.E.2d 48 (1974).

Filing of notice of appeal constitutes entry of appeal. — Although notice of appeal is dated prior to entry of judgment intended to be appealed from, it is filing of notice of appeal which constitutes entering an appeal. *Anthony v. Anthony*, 120 Ga. App. 261, 170 S.E.2d 273 (1969).

As to what constitutes filing within meaning of section. — See *Bailey v. Bonaparte*, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Best evidence of filing. — Certificate of clerk, entered upon paper when it is filed, is best evidence of filing as required by section. *Bailey v. Bonaparte*, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Proof that notice was in clerk's office within time prescribed. — Where a notice of appeal is alleged to have been in the clerk's office in time but not filed by that functionary within 30-day period, such proof does not furnish satisfactory compliance with statutory requirement of filing. *Bank of Coweta v. Lee*, 153 Ga. App. 33, 264 S.E.2d 526 (1980).

Section 9-11-6(b) is inapplicable to time for filing. — Section 9-11-6(b) does not apply to periods of time which are definitely fixed by statute, as time for filing of notice of

appeal, as provided by this section. *Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos.*, 116 Ga. App. 503, 157 S.E.2d 767 (1967).

Day of entry of decision. — Where trial court's denial of appellant's motion for judgment notwithstanding verdict was filed same day appellant filed its notice of appeal, appeal was timely. *Bank of Tenn. v. Rochester*, 165 Ga. App. 1, 299 S.E.2d 109 (1983).

Notice timely if filed within 30 days of entry of order. — So long as the notice of appeal is filed within 30 days following the entry of the order granting, overruling, or otherwise finally disposing of the motion for new trial, the appeal is timely. *Phelps v. State*, 158 Ga. App. 219, 279 S.E.2d 513 (1981); *Jessup v. Newman*, 191 Ga. App. 772, 383 S.E.2d 136, cert. denied, 191 Ga. App. 922, 383 S.E.2d 136 (1989).

Where application unnecessarily filed pursuant to § 5-6-35. — When the custodial parent in a child custody habeas corpus proceeding unnecessarily files an application for appeal in accordance with § 5-6-35, and the Supreme Court grants the application, and a notice of appeal then is timely filed, the Supreme Court has jurisdiction of the appeal even though no notice of appeal was filed in accordance with this section within 30 days from entry of judgment in the trial court. *Wright v. Hanson*, 248 Ga. 523, 283 S.E.2d 882 (1981).

Obvious error in notice of appeal. — As it was clear that the appellant was appealing the entry of judgment in favor of the appellee, the notice of appeal was deemed filed within 30 days of the entry of judgment, despite the fact that the notice erroneously stated that it was from the prior directed verdict. *Horton v. Allstate Ins. Co.*, 171 Ga. App. 707, 320 S.E.2d 761 (1984), overruled on other grounds, *Carter v. Banks*, 254 Ga. 550, 330 S.E.2d 866 (1985).

Improper dismissal of an appeal from an order granting a motion for directed verdict occurred where, even though the notice of appeal was technically defective, final judgment had been rendered in the case and the notice of appeal was sufficient to notify the opposing party that an appeal was being taken. *Steele v. Cincinnati Ins. Co.*, 252 Ga. 58, 311 S.E.2d 470 (1984).

Double extensions a nullity. — Since neither the trial court nor the Court of Appeals

has jurisdiction to grant more than one extension, or any extension of more than 30 days for the filing of a notice of appeal, the trial court's two extensions purporting to extend the filing time for more than 30 days were a nullity. *Gibson v. State*, 207 Ga. App. 491, 428 S.E.2d 421 (1993).

2. Running of Time for Filing

Filing of judgment, not its entry on docket starts running. — It is filing of judgment, signed by judge, with clerk which starts running of applicable 30-day limit and not clerk's subsequent entry on docket. *Lewis & Sheron Enterprises, Inc. v. Great A & P Tea Co.*, 136 Ga. App. 910, 222 S.E.2d 659 (1975).

Notice to party of entry of judgment is not prerequisite to commencement of 30-day period during which appeal must be filed. *Alexander v. Blackmon*, 129 Ga. App. 214, 199 S.E.2d 376 (1973).

Effect of notice of entry. — Counsel are not entitled to notice of entry of judgment to start 30-day period running. *Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc.*, 147 Ga. App. 590, 249 S.E.2d 631 (1978).

Where judgment is set aside and reen-tered. — Where no notice of entry of judgment is sent by trial court or by clerk to losing party, as required by § 15-6-21, action may be brought under § 9-11-60(g) to set aside earlier judgment; upon granting of such motion to set aside and reentry of judgment, 30-day period within which losing party must appeal will begin to run from date of reentry. *Cambron v. Canal Ins. Co.*, 246 Ga. 147, 269 S.E.2d 426 (1980).

Where 30th day falls on Saturday. — Where 30th day from entering of judgment falls on Saturday, under § 1-3-1(d)(3), notice of appeal can be filed on following Monday. *Thomas v. Allstate Ins. Co.*, 133 Ga. App. 193, 210 S.E.2d 361 (1974), rev'd on other grounds, *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 248 S.E.2d 641 (1978).

Where a defendant voluntarily abandons his motion for a new trial and, therefore, no order was entered granting, overruling, or otherwise finally disposing of the motion, notice of appeal must still be filed within 30 days after entry of an appealable judgment. *Taylor v. State*, 173 Ga. App. 745, 327 S.E.2d 860 (1985).

Unconditional withdrawal of the new trial motion, by filing of a written order of the court, starts anew the running of the statutory 30-day period of subsection (a) in which appellant can timely file notice of appeal. *Ailion v. Wade*, 190 Ga. App. 151, 378 S.E.2d 507 (1989).

Deadline not extended by motion to vacate summary judgment. — Party's motion to vacate a grant of summary judgment for the opposing party did nothing to extend the deadline for filing a notice of appeal from the order granting the summary judgment. *Thompson v. GMAC*, 194 Ga. App. 526, 391 S.E.2d 2 (1990).

3. Premature Filing

Appeal from judgment while case is pending on motion for new trial is premature and will be dismissed. *Smith v. Smith*, 128 Ga. App. 29, 195 S.E.2d 269 (1973).

Notice of appeal from judgment filed while motion for new trial is pending is premature and of no validity. *Moody v. Moody*, 141 Ga. App. 185, 233 S.E.2d 385 (1977); *Strauss v. Peachtree Assocs.*, 156 Ga. App. 536, 275 S.E.2d 90 (1980).

Appeal filed while motion for new trial or for judgment n.o.v. remain pending. — Notice of appeal is prematurely filed when motion for new trial or motion for judgment n.o.v. or both motions remain undisposed of by trial court and appeal must be dismissed; this is true even where both motions are filed pursuant to § 9-11-50(b) and one is denied and the other remains pending. *Pirkle v. Triplett*, 153 Ga. App. 524, 265 S.E.2d 854 (1980).

Effect of denial of new trial motion. — The disposition of the motion for new trial obviated all need for an out-of-time appeal, since the defendant had 30 days after entry of that judgment in which to file an ordinary appeal. Nevertheless, while the denial of the new trial motion was the demise of the notice of appeal, filed earlier, as an out-of-time appeal, it served to vitalize it as a timely appeal. As a premature notice of appeal it became effective upon entry of a final judgment. *Shirley v. State*, 188 Ga. App. 357, 373 S.E.2d 257 (1988).

Service of notice by mail prior to filing of original. — It is no ground for dismissal of appeal that service of notice of appeal was made by mail three days before original was

Filing (Cont'd)**3. Premature Filing (Cont'd)**

filed, or that order was in first instance erroneously dated. *Fidelity & Cas. Co. v. Whitehead*, 117 Ga. App. 200, 160 S.E.2d 241 (1968).

Premature notice of appeal where no prejudice will result. — If notice of appeal is sufficient to advise opposing party that appeal is being taken from specific judgment, and if no prejudice will result to appellee in allowing appeal, then appeal should not be dismissed merely because notice is premature. *Kenerly v. Yancey*, 144 Ga. App. 295, 241 S.E.2d 28 (1977).

Where premature notice of appeal not dismissed, subsequent notice will be dismissed. — Where premature notice of appeal, which was filed before judgment was entered, was not subject to dismissal, subsequently filed notice of appeal was dismissed as redundant. *Elwell v. Nesmith*, 246 Ga. 430, 271 S.E.2d 827 (1980).

Withdrawal of initial notice of appeal until disposition of co-defendant's new-trial motion. — Defendant did not act improperly when she withdrew her initial notice of appeal and did not file another until after the disposition of her co-defendant tortfeasor's motion for new trial; her notice of appeal, filed within 30 days of the denial of her co-defendant's motion for new trial, was therefore timely. *Denson v. Kloack*, 177 Ga. App. 483, 339 S.E.2d 761 (1986).

4. Late Filing

Notice filed 31 days after rendition of judgment is too late. — Where judgment appealed from is final, notice of appeal filed 31 days after rendition of judgment is too late and Court of Appeals is without jurisdiction to entertain appeal. *Hull v. Campbell*, 130 Ga. App. 637, 204 S.E.2d 312 (1974).

Where notice of appeal was filed only one day late, court was powerless to deny motion to dismiss filed by appellee. *Associated Bldrs. Supply v. Georgia-Pacific Corp.*, 123 Ga. App. 222, 180 S.E.2d 273 (1971).

Notice of appeal filed after expiration of 30-day filing requirement. — Where defendant's notice of appeal (from an order entered in the county superior court on October 12, 1988) although dated November 9, 1988, was not filed with the clerk of the

county superior court until November 21, the appeal is therefore untimely and must be dismissed. *Howard v. Wilkes*, 191 Ga. App. 239, 382 S.E.2d 434 (1989).

A notice of appeal filed within 30 days of the filing of an order allowing an out-of-time appeal is timely. *Davis v. State*, 192 Ga. App. 47, 383 S.E.2d 615 (1989).

Notice not amendable in appellate court nor in trial court after expiration of time for filing. — Notice is not amendable in Court of Appeals nor is it amendable in trial court after expiration of time for filing prescribed by section. *Teppenpaw v. Blalock*, 121 Ga. App. 320, 173 S.E.2d 442, aff'd, 226 Ga. 619, 176 S.E.2d 711 (1970).

Application for extension must be within 30-day period. — Trial court has no jurisdiction to grant extension of time for filing notice of appeal where application for an extension is not made before expiration of 30-day period prescribed by section. *Morris v. State*, 115 Ga. App. 715, 155 S.E.2d 735 (1967).

Vacating judgment and entering new one to give appellant additional time. — After appeal is dismissed for untimely filing of notice of appeal, although allegedly caused by repeated misstatements of clerk, trial court may not vacate its original judgment and enter new one, in order to give appellant an opportunity to enter a fresh appeal. *Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc.*, 147 Ga. App. 590, 249 S.E.2d 631 (1978).

Effect of voluntary dismissal after 30-day period. — Trial court cannot reinstate notice of appeal after plaintiffs have voluntarily dismissed appeal after 30-day period during which appeal is allowed by this section. *Albert v. Bryan*, 150 Ga. App. 649, 258 S.E.2d 300 (1979).

Grant of out-of-time appeals in criminal cases. — Out-of-time appeals are granted where defendant in criminal case is not advised of right of appeal or his counsel fails to appeal. *Birt v. Hopper*, 245 Ga. 221, 265 S.E.2d 276 (1980), cert. denied, 449 U.S. 855, 101 S. Ct. 150, 66 L. Ed. 2d 68 (1980).

The State of Georgia recognizes the right to effective assistance of counsel at trial and on first appeal as of right and has provided for ameliorative relief in the form of an out-of-time appeal. An appellant who is denied effective assistance of counsel in at-

tempting to appeal his conviction shall be allowed, if he so desires, to file an out of time appeal to the proper appellate court. *Brantley v. State*, 190 Ga. App. 642, 379 S.E.2d 627 (1989).

Motion to review or reconsider filed after 30 days. — Where the appellant does not file his motion to review or reconsider until well after the 30 days allowed for notice of appeal, the appeal is not properly and timely filed so as to invoke the jurisdiction of the appellate court, and it must be dismissed. *Stonecypher v. State*, 168 Ga. App. 507, 308 S.E.2d 639 (1983).

Notice of appeal filed within 30 days of order of distribution of damages, which is incidental to and does not affect the validity of the prior judgment, but beyond 30 days after the entry of judgment, cannot invoke the jurisdiction of this court and therefore must be dismissed. *Duke v. Metropolitan Atlanta Rapid Transit Auth.*, 166 Ga. App. 773, 305 S.E.2d 404 (1983).

Momentary incapacity of attorney. — The contention that the defendant was denied effective assistance of counsel when he entered his guilty plea because his attorney suffered from laryngitis was not a sufficient reason for granting an out-of-time appeal, there being no claim of substantive or technical ineffectiveness on the part of counsel. *Holbrook v. State*, 171 Ga. App. 449, 320 S.E.2d 637 (1984).

Opposing counsel's consent to late filing. — Without proper and timely filing of notice of appeal dismissal is required in spite of the fact of consent given by opposing counsel to the late appeal, as parties may not give jurisdiction to a court by consent, express or implied, as to the person or subject matter of an action. *Clark v. State*, 182 Ga. App. 752, 357 S.E.2d 109 (1987).

Automatic Extension of Time for Filing

1. In General

Section limits motions that extend filing date for notice of appeal to motions for new trial, motions in arrest of judgment or motions notwithstanding verdict. *Donnelly v. Stynchcombe*, 246 Ga. 118, 269 S.E.2d 10 (1980); *Parker v. State*, 156 Ga. App. 299, 274 S.E.2d 694 (1980).

No automatic extension except as specifically provided. — Date for filing notice of

appeal is not automatically extended by proceedings following final judgment except in those instances specifically set forth. This section contains no provision which would permit time for filing notice of appeal to be extended further by filing motion for rehearing after motion for new trial has been overruled where judgment overruling motion is not vacated. *Hogan v. State*, 118 Ga. App. 398, 163 S.E.2d 889 (1968). (But see *Johnson v. Barnes*, 237 Ga. 502, 229 S.E.2d 70 (1976)).

Appeal is not timely when motion on which it is based is not included among motions enumerated in this section, which automatically extend filing date for notice of appeal. *Robinson v. Carswell*, 147 Ga. App. 521, 249 S.E.2d 331 (1978). (But see *Johnson v. Barnes*, 237 Ga. 502, 229 S.E.2d 70 (1976)).

"Has been filed," regarding a delaying motion, means filed within 30 days after entry of judgment. *Smith v. Forrester*, 145 Ga. App. 281, 243 S.E.2d 575 (1978); *Mayo v. State*, 148 Ga. App. 213, 251 S.E.2d 80 (1978).

Reaffirmance of dismissal of counterclaims does not extend time for filing. — Where the time for filing the notice of appeal runs from the date of the voluntary dismissal of the appellees' counterclaims, the trial court is powerless to extend the time by entering a subsequent order reaffirming the dismissal of the complaint, even had it intended to do so. *Caswell v. Caswell*, 157 Ga. App. 710, 278 S.E.2d 452 (1981).

2. What Motions Extend Time for Filing

Motion to set aside judgment. — There is at least one motion not enumerated in subsection (a) which has effect of extending time for filing notice of appeal, to wit: a motion to set aside judgment. *Johnson v. Barnes*, 237 Ga. 502, 229 S.E.2d 70 (1976). (But see *Lawler v. Georgia Mut. Ins. Co.*, 156 Ga. App. 265, 276 S.E.2d 646 (1980)).

Motion to set aside will extend time for filing notice of appeal. *Littlejohn v. Tower Assocs.*, 163 Ga. App. 37, 293 S.E.2d 33 (1982).

A motion to set aside will extend the time for filing the notice of appeal. However, to do so the motion to set aside must be predicated upon some nonamendable defect which does appear upon the face of the

Automatic Extension of Time for**Filing (Cont'd)****2. What Motions Extend Time for****Filing (Cont'd)**

record or pleadings or upon lack of jurisdiction of the person or subject matter. *Mathis v. Hegwood*, 169 Ga. App. 547, 314 S.E.2d 122, cert. denied, 469 U.S. 830, 105 S. Ct. 115, 83 L. Ed. 2d 58 (1984); *Law Offices of Johnson & Robinson v. Fortson*, 175 Ga. App. 706, 334 S.E.2d 33 (1985).

Pendency of motion for new trial extends time for filing a notice of appeal. *Hughes v. Newell*, 152 Ga. App. 618, 263 S.E.2d 505 (1979).

Motion to dismiss appeal on ground that notice of appeal was filed more than 30 days after judgment of conviction was without merit, where intervening time was tolled by motion for new trial, judgment denying which was filed 29 days prior to filing of notice of appeal. *Reed v. State*, 163 Ga. App. 364, 295 S.E.2d 108 (1982).

Motion for new trial must be timely filed to toll time. — Where purported motion for new trial was not filed within 30 days as required by § 5-5-40, it was thus void and of no effect, and therefore did not toll time for filing notice of appeal under this section. *Johnson v. State*, 227 Ga. 219, 180 S.E.2d 94 (1971).

An untimely motion for new trial is void and does not operate to toll the time for filing of the notice of appeal. *Wright v. Rhodes*, 198 Ga. App. 269, 401 S.E.2d 35 (1990).

Application for new trial is made only by filing motion for new trial. *Smith v. Forrester*, 145 Ga. App. 281, 243 S.E.2d 575, cert. denied, 439 U.S. 863, 99 S. Ct. 185, 58 L. Ed. 2d 172 (1978).

"Arrest of judgment" refers to criminal appeals. — The exclusive method by which civil judgments may be attacked is set forth in § 9-11-60 and an arrest of judgment is not enumerated therein. Thus, even though this section lists "arrest of judgment" as one of the motions which extends the time for filing a notice of appeal, it apparently refers to criminal appeals. *Daniels v. McRae*, 180 Ga. App. 732, 350 S.E.2d 317 (1986).

Motion to amend findings of fact and conclusions of law is not a motion which extends the time for filing a notice of appeal

in a civil case. *American Flat Glass Distribs., Inc. v. Michael*, 260 Ga. 312, 392 S.E.2d 855 (1990).

Petition to set aside probate court determination. — Claimant's "petition to set aside" a probate court determination that she was not the widow of the decedent was properly treated as a motion for new trial, which tolled the time for appeal to the superior court. *Reid v. Reid*, 201 Ga. App. 530, 411 S.E.2d 754 (1991).

3. When Time for Filing Not Extended

Motion for reconsideration is not one of the three statutory motions which extend time for filing of notice of appeal. *Ellis v. Continental Ins. Co.*, 141 Ga. App. 809, 234 S.E.2d 377 (1977); *Lawler v. Georgia Mut. Ins. Co.*, 156 Ga. App. 265, 276 S.E.2d 646 (1980); *Hunter v. Big Canoe Corp.*, 162 Ga. App. 629, 291 S.E.2d 726 (1982); *Littlejohn v. Tower Assocs.*, 163 Ga. App. 37, 293 S.E.2d 33 (1982); *Rockdale County v. Water Rights Comm., Inc.*, 189 Ga. App. 873, 377 S.E.2d 730 (1989).

Motion for reconsideration of order denying summary judgment is not included among those motions enumerated in section which automatically extend filing date for notice of appeal. *Adamson v. Adamson*, 226 Ga. 719, 177 S.E.2d 241 (1970); *Bernath Barrel & Drum Co. v. Ostrum Boiler Serv., Inc.*, 131 Ga. App. 140, 205 S.E.2d 459 (1974); *Presley v. Greene*, 137 Ga. App. 788, 225 S.E.2d 60 (1976); *Powell v. Darby Bank & Trust Co.*, 163 Ga. App. 524, 295 S.E.2d 222 (1982).

Motion for reconsideration of order granting summary judgment and dismissing counterclaim, both final and appealable judgments, is not included among those motions enumerated in this section, which automatically extend filing date for notice of appeal. *Fowler v. Lewis*, 150 Ga. App. 174, 257 S.E.2d 21 (1979); *Peppers House Restaurant, Inc. v. Siefferman*, 156 Ga. App. 114, 274 S.E.2d 43 (1980); *Morton v. Morton*, 163 Ga. App. 830, 296 S.E.2d 362 (1982).

A motion for reconsideration does not extend the time for filing a notice of appeal. *Becker v. Fairman*, 167 Ga. App. 708, 307 S.E.2d 520 (1983); *Guthrie v. D.L. Claborn Buick/Opel, Inc.*, 180 Ga. App. 128, 348 S.E.2d 523 (1986).

The denial of a motion which does not

purport to be based either on a nonamendable defect or on a lack of jurisdiction but is simply a request for the trial court to reconsider its decision, is not appealable in its own right pursuant to § 9-11-60(d), and the filing of such a motion does not extend the time for filing a notice of appeal. *Dougherty County v. Burt*, 168 Ga. App. 166, 308 S.E.2d 395 (1983).

When the mother's parental rights were terminated by order of the juvenile court, her motion for reconsideration, based solely on sufficiency of the evidence, did not extend the time for filing a notice of appeal and it could not be regarded as a reason to vacate or modify the judgment of the court. *In re A.C.J.*, 211 Ga. App. 865, 440 S.E.2d 751 (1994).

Motion to amend judgment. — An appeal from a motion to amend judgment of a probate court is not a final judgment and thus, is not an appealable decision within the meaning of § 5-3-2(a). Nor will such a motion extend the date for filing a notice of appeal under the plain and literal language of § 5-3-20(a). *Jabaley v. Jabaley*, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Motion to withdraw findings of fact and conclusions of law. — *W.T.A. Assocs. v. Beamon*, 141 Ga. App. 25, 232 S.E.2d 373 (1977).

Motion for a new trial as to grant of summary judgment. — Motion for new trial is not proper vehicle for obtaining re-examination of grant of summary judgment and motion so filed has no validity and will not extend filing date of notice of appeal. *Shine v. Sportservice Corp.*, 140 Ga. App. 355, 231 S.E.2d 130 (1976); *Moore v. First Nat'l Bank*, 148 Ga. App. 631, 252 S.E.2d 60 (1979).

Time not extended where motion for new trial not proper. — Where new-trial motion is not proper vehicle for review of trial court's action, the motion has no validity and will not extend the time for filing the notice of appeal. *Pillow v. Seymour*, 255 Ga. 683, 341 S.E.2d 447 (1986).

Motion for new trial. — Where new-trial motion is not proper vehicle for review of trial court's action, the motion has no validity and will not extend the time for filing the notice of appeal. *Pillow v. Seymour*, 255 Ga. 683, 341 S.E.2d 447 (1986).

Improper motion for new trial. — Alleged motion for new trial which did not contest

factual issues or errors contributing to the verdict, but instead challenged only the trial court's legal conclusions and judgment, was not a proper motion for new trial and did not entitle party an automatic stay in filing its notice of appeal. *Bank S. Mtg., Inc. v. Starr*, 208 Ga. App. 19, 429 S.E.2d 700 (1993).

Nunc pro tunc entry does not extend the statutory period for filing a notice of appeal. *Bowen v. Clayton County Hosp. Auth.*, 160 Ga. App. 809, 288 S.E.2d 232 (1982).

Motion to set aside. — Although the denial of a motion to set aside is final and appealable, such a motion is not one which will automatically extend the time for filing notice of appeal on the underlying judgment. *Dutton v. Dykes*, 159 Ga. App. 48, 283 S.E.2d 28 (1981). (But see *Johnson v. Barnes*, 237 Ga. 502, 229 S.E.2d 70 (1976)).

Where defendant chose to denominate her motion as one to vacate and set aside the summary judgment, but the motion was nothing more than a request for a reconsideration of the trial court's summary judgment award, the motion did not extend the time for the filing of a notice of appeal, and therefore the notice of appeal was not timely filed. *Perryman v. Georgia Power Co.*, 180 Ga. App. 259, 348 S.E.2d 762 (1986).

Motion to set aside the judgment, which was not predicated upon a nonamendable defect or a lack of jurisdiction, did not extend the time for the filing of a notice of appeal. *Rockdale County v. Water Rights Comm., Inc.*, 189 Ga. App. 873, 377 S.E.2d 730 (1989).

A motion to reinstate an action dismissed as a sanction for failure to comply with the trial court's order to answer interrogatories timely cannot be considered as one of the three types of motions which toll the running of the time for appeal from the judgment of dismissal. *Daniels v. McRae*, 180 Ga. App. 732, 350 S.E.2d 317 (1986).

Motion for rehearing order denying motion coram nobis. — Motion for a rehearing of order denying motion coram nobis and other motions of this type is not one of the three motions which automatically toll 30-day filing period. *Allanson v. State*, 239 Ga. 154, 236 S.E.2d 348 (1977).

Modification of summary judgment order. — Granting of summary judgment is an appealable order under § 9-11-56(h) and a

Automatic Extension of Time for Filing (Cont'd)

3. When Time for Filing Not Extended (Cont'd)

modification of that order does not automatically extend filing date for notice of appeal under this section. *Wilson v. Coite Somers Co.*, 138 Ga. App. 455, 226 S.E.2d 277 (1976).

Demand for jury trial subsequent to judgment of trial court in suit to quiet title cannot be regarded as one of the enumerated ways specified in section to toll 30-day period in which notice of appeal must be filed from final judgment. *Thornton v. Reb Properties, Inc.*, 237 Ga. 59, 226 S.E.2d 741 (1976).

Motion to vacate and set aside final judgment is not a motion included among those motions enumerated in this section. *Williams v. Keebler*, 222 Ga. 437, 150 S.E.2d 674, answer conformed to 114 Ga. App. 332, 151 S.E.2d 483 (1966); *Shannon Co. v. Heneveld*, 135 Ga. App. 252, 217 S.E.2d 424, rev'd on other grounds, 238 Ga. 635, 221 S.E.2d 200 (1975); *Lawler v. Georgia Mut. Ins. Co.*, 156 Ga. App. 265, 276 S.E.2d 646 (1980).

A motion to vacate and set aside final judgment does not extend the time for filing a notice of appeal. *Law Offices of Johnson & Robinson v. Fortson*, 175 Ga. App. 706, 334 S.E.2d 33 (1985).

Motion to strike a portion of the jury verdict and the judgment is not one of the three statutory motions which extend the time for filing a notice of appeal, and appellant's failure to follow the procedures for discretionary appeal require his appeal's dismissal. *Jones v. Robertson*, 191 Ga. App. 537, 382 S.E.2d 382 (1989).

A motion to vacate and/or amend an order of dismissal is not one of the three statutory motions which extend the time of filing of the notice of appeal. *Mathis v. Hegwood*, 169 Ga. App. 547, 314 S.E.2d 122, cert. denied, 469 U.S. 830, 105 S. Ct. 115, 83 L. Ed. 2d 58 (1984).

Attempt to amend notice of appeal, which was timely as to summary judgment in one case, to incorporate previously unfiled notice of appeal in a companion case was untimely where summary judgment in companion case had been granted 75 days ear-

lier. *Newton v. K.B. Property Mgt. of Ga., Inc.*, 166 Ga. App. 901, 306 S.E.2d 5 (1983).

Lack of notice of entry of judgment does not extend time for filing a notice of appeal. *Atlantic-Canadian Corp. v. Hammer, Siler, George Assocs.*, 167 Ga. App. 257, 306 S.E.2d 22 (1983).

A supersedeas is not among exceptions which automatically extend filing date for notices of appeal. *Wilson v. McQueen*, 224 Ga. 420, 162 S.E.2d 313 (1968), overruled on other grounds, *Austin v. Carter*, 248 Ga. 776, 285 S.E.2d 542 (1982).

Jurisdiction of probate court in county without more than 100,000 persons. — Probate court of county that did not have a population of more than 100,000 persons according to either the 1980 or 1990 decennial census lacked authority to entertain a motion for new trial, and any such motion therefore being without legal force and effect before the county probate court, would not serve to extend the time for filing a notice of appeal under either subsection (a) of this section or § 5-3-20. *Jabaley v. Jabaley*, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Cross Appeals

By appellee. — An appellee may institute a cross-appeal against a party other than an appellant. *Centennial Ins. Co. v. Sandner, Inc.*, 259 Ga. 317, 380 S.E.2d 704 (1989).

Cross appeal need not be grounded upon same ruling as main appeal. — Section expressly declares that appellee may raise all errors or rulings on cross appeal, and it need not be grounded upon same ruling as main appeal. *Nager v. Lad'n Dad Slacks*, 148 Ga. App. 401, 251 S.E.2d 330 (1978).

Valid appeal must be perfected before cross appeal can be perfected. — Valid appeal from judgment must be perfected in accordance with this article so as to give appellate court jurisdiction, before cross appeal by any other party to case can be perfected so as to give appellate court jurisdiction of cross appeal. *Wood v. Atkinson*, 229 Ga. 179, 190 S.E.2d 46 (1972); *Ewing Holding Corp. v. Egan-Stanley Invs., Inc.*, 154 Ga. App. 493, 268 S.E.2d 733 (1980).

Cross-appeal to appealable order. — An appeal which, standing alone, would be subject to discretionary appeal procedures, is appealable as a matter of right if it is classifiable as a cross-appeal to an appealable

order. *Buschel v. Kysor/Warren*, 213 Ga. App. 91, 444 S.E.2d 105 (1994).

Cross appeal from nonfinal judgment permissible though main appeal is from judgment disposing of only one party and case remains pending in court below. *Garrett v. Heisler*, 149 Ga. App. 240, 253 S.E.2d 863 (1979).

Cross appeal may concern motion to dismiss while main appeal concerns judgment dismissing party. — This section and § 5-6-37 allow appellee to file, as a matter of right, cross appeal as to trial court's judgment denying appellee's motion to dismiss when appellant appeals trial court's judgment dismissing another party from case. *Executive Jet Sales, Inc. v. Jet America, Inc.*, 242 Ga. 307, 248 S.E.2d 676 (1978).

Although entitled a "cross appeal," where defendant's appeal was actually an attempted independent appeal from the trial court's subsequent award of post-judgment interest to plaintiff, his appeal was not subject to dismissal under this section for not having been filed within 15 days of service of plaintiff's notice of appeal. *Beavers v. Gilstrap*, 210 Ga. App. 46, 435 S.E.2d 267 (1993).

Notice of cross appeal required. — An appellee may not present enumerations of error concerning rulings adverse to it without filing a notice of cross appeal. *Chester v. Georgia Mut. Ins. Co.*, 165 Ga. App. 783, 302 S.E.2d 594 (1983).

Where appellee has filed briefs in the appellate court in support of a cross appeal attacking the grant of summary judgment to appellants but no such cross appeal has been docketed in the appellate court, the correctness of the trial court's grant of summary judgment to appellants is not before the appellate court and will not be considered. *Chester v. Georgia Mut. Ins. Co.*, 165 Ga. App. 783, 302 S.E.2d 594 (1983).

Notice held untimely. — Where cross-appellants contended that because appellant in August 1986 successfully moved the trial court to allow her to amend her notice of appeal merely to change the designated parts of the record necessary to her appeal and thus to delete certain portions of the record, this constituted a novation or extension of her original notice of appeal of

April 11, 1986, it was held that the filing of the cross appeal in the Supreme Court on August 25 must be related to the original notice of appeal filed by appellant April 11 and could draw life from a mere modification of the notice of appeal reducing the amount of record as originally noticed in the original appeal. It followed that the filing of the notice of cross appeal on August 25, 1986, was far beyond the 15 days allowed for the filing of such a cross appeal. *Mobley v. Coast House, Ltd.*, 182 Ga. App. 305, 355 S.E.2d 686 (1987).

Failure to file notice of cross appeal makes review of brief unnecessary. — Where appellee denominates one section of her brief a "cross appeal," but the record reveals that no notice of cross appeal was ever filed, the Court of Appeals need not address this contention in view of subsections (a) and (b) of this section. *Life Ins. Co. v. Helmuth*, 182 Ga. App. 750, 357 S.E.2d 107, cert. denied, 182 Ga. App. 910, 357 S.E.2d 107 (1987).

Where appellee asserted in a pro se responsive brief that the trial court erred in finding that he was indebted to the appellant for post-acceleration interest on the accelerated balance, the court of appeals was unable to address this assertion since no cross-appeal had been filed. *Karr v. Ryback*, 186 Ga. App. 842, 368 S.E.2d 799 (1988).

Motion to have costs of preparing transcript and record for appeal divided equally between the plaintiff and the defendant deals with costs incurred in the trial court and should be addressed to that court subject to review on appeal. *Van Geter v. Housing Auth.*, 167 Ga. App. 432, 306 S.E.2d 707 (1983), aff'd, 252 Ga. 196, 312 S.E.2d 309 (1984).

Criminal defendants cannot cross appeal suits brought by state. — Despite resultant justice and judicial economy, court will not allow criminal defendants to cross appeal suits brought before court by state pursuant to § 5-7-1; this section limits that right to civil parties and the court will not encroach upon the legislature's prerogative by extending that right. *State v. Crapse*, 173 Ga. App. 100, 325 S.E.2d 620 (1984), overruled on other grounds, *Hubbard v. State*, 176 Ga. App. 622, 337 S.E.2d 60 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, § 177.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 273-282, 290-294, 348, 353, 355, 381, 388, 389.

ALR. — Lower court's consideration, on the merits, of unseasonable application for new trial, rehearing, or other re-examination, as affecting time in which to apply for appellate review, 148 ALR 795.

Amendment of judgment as affecting time for taking or prosecuting appellate review proceedings, 21 ALR2d 285.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 ALR2d 482.

Participation in, acceptance of, or submission to new trial as precluding appellate review of order granting it or of issue determined in first trial, 67 ALR2d 191.

Retroactive effect on appeal from judgment previously entered of statute shortening time allowed for appellate review, 81 ALR2d 417.

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal has passed, 32 ALR3d 1290.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 ALR5th 422.

5-6-39. Extensions of time for filing notice of appeal, notice of cross appeal, transcript of evidence, designation of record and other similar motions.

(a) Any judge of the trial court or any justice or judge of the appellate court to which the appeal is to be taken may, in his discretion, and without motion or notice to the other party, grant extensions of time for the filing of:

(1) Notice of appeal;

(2) Notice of cross appeal;

(3) Transcript of the evidence and proceedings on appeal or in any other instance where filing of the transcript is required or permitted by law;

(4) Designation of record referred to under Code Section 5-6-42; and

(5) Any other similar motion, proceeding, or paper for which a filing time is prescribed.

(b) No extension of time shall be granted for the filing of motions for new trial or for judgment notwithstanding the verdict.

(c) Only one extension of time shall be granted for filing of a notice of appeal and a notice of cross appeal, and the extension shall not exceed the time otherwise allowed for the filing of the notices initially.

(d) Any application to any court, justice, or judge for an extension must be made before expiration of the period for filing as originally prescribed or as extended by a permissible previous order. The order granting an extension of time shall be promptly filed with the clerk of the trial court, and the party securing it shall serve copies thereof on all other parties in the manner prescribed by Code Section 5-6-32. (Ga. L. 1965, p. 18, § 6.)

Cross references. — Extension of expiration date, Rules of the Supreme Court of the State of Georgia, Rule 3. Postmark date, Rules of the Supreme Court of the State of Georgia, Rule 4. Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Extension of expiration dates, Rules of the Court of Appeals of the State of

Georgia, Rule 3. Extensions of time for filing, Rules of the Court of Appeals of the State of Georgia, Rule 28. Notices of appeal and cross appeal, Rules of the Court of Appeals of the State of Georgia, Rule 33.

Law reviews. — For article, "Insuring a Party's Second Chance," see 16 Ga. St. B.J. 177 (1980). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982).

For comment on *Davis v. Davis*, 222 Ga. 579, 151 S.E.2d 123 (1966), see 4 Ga. St. B.J. 259 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION TIMELINESS OF APPLICATION GRANTS OF EXTENSIONS 1. NOTICE OF APPEAL 2. TRANSCRIPTS

General Consideration

For proper reasons, appellate courts will entertain an out of time appeal. *Mitchell v. State*, 157 Ga. App. 181, 276 S.E.2d 864 (1981).

Court has broad discretion in granting extensions of time. *Brookshire v. J.P. Stevens Co.*, 133 Ga. App. 97, 210 S.E.2d 46 (1974).

Section 9-11-6(e) does not apply to this section, the filing time not being predicated on service of notice. *Akin v. Sanders*, 228 Ga. 251, 184 S.E.2d 660 (1971).

Fact that section does not provide for notice and hearing does not render it void. *Rogers v. McDonald*, 226 Ga. 329, 175 S.E.2d 25 (1970).

Notice and hearing are not always necessary for due process. — Often, with time about to run out, notice and hearing are impossible, and are not necessary for due process. *Rogers v. McDonald*, 226 Ga. 329, 175 S.E.2d 25 (1970).

Where appeal involves criminal defendant who has been ineffectively represented by counsel at trial, this section is inapplicable. *Ingram v. State*, 134 Ga. App. 935, 216 S.E.2d 608 (1975).

Proper, timely filing of notice of appeal is absolute requirement to confer appellate jurisdiction. *Jordan v. Caldwell*, 229 Ga. 343,

191 S.E.2d 530 (1972); *Associated Distribs., Inc. v. Willard*, 242 Ga. 247, 248 S.E.2d 645 (1978); *Mitchell v. State*, 157 Ga. App. 181, 276 S.E.2d 864 (1981).

Burden is on party desiring to take appeal. — Burden is on party desiring to take appeal to determine when judgment is filed in trial court, and to file his notice of appeal within 30-day period or within duly authorized extension of 30-day period. *Jordan v. Caldwell*, 229 Ga. 343, 191 S.E.2d 530 (1972); *Associated Distribs., Inc. v. Willard*, 242 Ga. 247, 248 S.E.2d 645 (1978).

Dismissal for failure to comply. — Failure to file notice of appeal or obtain extension within 30-day period, subjects appeal to dismissal. *Mayo v. State*, 148 Ga. App. 213, 251 S.E.2d 80 (1978).

Defendant's failure to timely file transcript or obtain extension of time requires dismissal of appeal. *Blackstone v. State*, 131 Ga. App. 666, 206 S.E.2d 553 (1974).

Failure to get extension. — Failure to get an extension is not, standing alone, a sufficient basis for dismissal. *Boulden v. Fowler*, 202 Ga. App. 237, 414 S.E.2d 263 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 263 (1992).

The failure to obtain an extension in the filing of transcripts is not, in and of itself, a sufficient basis for dismissal. *Welch v. Welch*,

General Consideration (Cont'd)

212 Ga. App. 667, 442 S.E.2d 857 (1994).

Requirements of section must be followed to confer jurisdiction upon appellate court. *Associated Distribs., Inc. v. Willard*, 242 Ga. 247, 248 S.E.2d 645 (1978).

Provisions of section are mandatory and unless complied with, appeal must be dismissed. *Herrington v. Leathers*, 115 Ga. App. 282, 154 S.E.2d 621 (1967); *Gilmore v. State*, 127 Ga. App. 249, 193 S.E.2d 219 (1972).

This section and § 5-6-42 are mandatory, and unless complied with, appeal must be dismissed. *Walker v. State Hwy. Dep't*, 115 Ga. App. 461, 154 S.E.2d 768 (1967); *Martin Theaters of Ga., Inc. v. Lloyd*, 118 Ga. App. 835, 165 S.E.2d 909 (1968); *Calloway v. State*, 119 Ga. App. 194, 166 S.E.2d 613 (1969); *Baxter v. Long*, 122 Ga. App. 500, 177 S.E.2d 712 (1970).

Counsel filing nonstatutory motions attacking final judgments should invoke protection of this section. *Johnson v. Barnes*, 237 Ga. 502, 229 S.E.2d 70 (1976).

Party wishing more time than permitted for appealing, should apply for extension under this section. Where appellant fails to exercise this right and appellee files motion to dismiss appeal under § 5-6-48, court has no alternative but to grant motion and dismiss appeal. *Hearn v. DeKalb County*, 118 Ga. App. 730, 165 S.E.2d 467 (1968).

This section expressly negatives any motion for extension having to be made, and requires filing only order granting extension. *Elliott v. Leathers*, 223 Ga. 497, 156 S.E.2d 440 (1967).

Extending time for filing application for discretionary appeal. — While the trial court has the authority under this section to grant a 30 day extension of time for filing a notice of appeal, there is no comparable authority for granting an extension of time for filing an application for discretionary appeal. *Rosenstein v. Jenkins*, 166 Ga. App. 385, 304 S.E.2d 740 (1983).

Second extension not authorized. — Trial court did not have authority to grant defendant a second 30-day extension of time to file notice of appeal. *Hughes v. State*, 210 Ga. App. 833, 437 S.E.2d 841 (1993).

Granting of out of time appeal by superior court is ineffective to confer jurisdiction upon the Supreme Court in civil cases.

Woodall v. Woodall, 248 Ga. 172, 281 S.E.2d 619 (1981).

Attempt to amend notice of appeal, which was timely as to summary judgment in one case, to incorporate previously unfiled notice of appeal in a companion case was untimely where summary judgment in companion case had been granted 75 days earlier. *Newton v. K.B. Property Mgt. of Ga., Inc.*, 166 Ga. App. 901, 306 S.E.2d 5 (1983).

Cited in *Stanford v. Evans*, *Reed & Williams*, 221 Ga. 331, 145 S.E.2d 504 (1965); *Lanier v. Fuller*, 113 Ga. App. 234, 147 S.E.2d 875 (1966); *Davis v. Davis*, 222 Ga. 579, 151 S.E.2d 123 (1966); *Sayers v. Rothberg*, 222 Ga. 626, 151 S.E.2d 445 (1966); *Benecke v. Boyer*, 115 Ga. App. 99, 153 S.E.2d 668 (1967); *Fleming v. Sanders*, 223 Ga. 172, 154 S.E.2d 14 (1967); *Threatt v. McElreath*, 223 Ga. 153, 154 S.E.2d 20 (1967); *Winn v. Powell*, 223 Ga. 257, 154 S.E.2d 233 (1967); *Joiner v. State*, 223 Ga. 367, 155 S.E.2d 8 (1967); *Wilcox v. Wilcox*, 223 Ga. 396, 156 S.E.2d 84 (1967); *Culver v. Sisk*, 223 Ga. 519, 156 S.E.2d 352 (1967); *Brown v. State*, 223 Ga. 540, 156 S.E.2d 454 (1967); *Poss v. State*, 116 Ga. App. 264, 157 S.E.2d 33 (1967); *Strickland v. Staten*, 223 Ga. 726, 157 S.E.2d 740 (1967); *Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos.*, 116 Ga. App. 503, 157 S.E.2d 767 (1967); *Gates v. Southern Ry.*, 118 Ga. App. 201, 162 S.E.2d 893 (1968); *Hogan v. State*, 118 Ga. App. 398, 163 S.E.2d 889 (1968); *Hardy v. D.G. Mach. & Gage Co.*, 224 Ga. 818, 165 S.E.2d 127 (1968); *Thomas v. State*, 118 Ga. App. 748, 165 S.E.2d 477 (1968); *Spadea v. Spadea*, 225 Ga. 80, 165 S.E.2d 836 (1969); *O'Quinn v. State*, 121 Ga. App. 231, 173 S.E.2d 409 (1970); *Richardson v. Nu-Way Cleaners & Laundry*, 121 Ga. App. 425, 174 S.E.2d 202 (1970); *Johnson v. State*, 122 Ga. App. 785, 178 S.E.2d 743 (1970); *Associated Bldrs. Supply v. Georgia-Pacific Corp.*, 123 Ga. App. 222, 180 S.E.2d 273 (1971); *Hardwick v. State*, 227 Ga. 467, 181 S.E.2d 376 (1971); *Lowe v. Lowe*, 123 Ga. App. 525, 181 S.E.2d 715 (1971); *Bramlett v. Smith*, 227 Ga. 523, 181 S.E.2d 849 (1971); *O'Kelley v. McLain*, 123 Ga. App. 669, 182 S.E.2d 189 (1971); *Carroll v. Holland*, 228 Ga. 649, 187 S.E.2d 531 (1972); *Bretz v. Fitzgerald*, 126 Ga. App. 367, 190 S.E.2d 619 (1972); *Model Cleaners & Laundry, Inc. v. Per Corp.*, 127 Ga. App. 559, 194 S.E.2d 258 (1972); *Irby v. Christian*, 130 Ga. App. 375,

203 S.E.2d 284 (1973); *Jackson v. State*, 130 Ga. App. 581, 203 S.E.2d 923 (1974); *Neal v. State*, 232 Ga. 96, 205 S.E.2d 284 (1974); *Taylor v. Whitmire*, 234 Ga. 449, 216 S.E.2d 310 (1975); *Johnson v. Clements*, 135 Ga. App. 495, 218 S.E.2d 109 (1975); *State v. Weeks*, 136 Ga. App. 637, 222 S.E.2d 117 (1975); *Lewis & Sheron Enters., Inc. v. Great A & P Tea Co.*, 136 Ga. App. 910, 222 S.E.2d 659 (1975); *Wilson v. Coite Somers Co.*, 138 Ga. App. 455, 226 S.E.2d 277 (1976); *Dargan, Whitington & Conner, Inc. v. Kitchen*, 138 Ga. App. 414, 226 S.E.2d 482 (1976); *May v. May*, 139 Ga. App. 672, 229 S.E.2d 145 (1976); *Smith v. State*, 140 Ga. App. 492, 231 S.E.2d 493 (1976); *Venable v. Block*, 141 Ga. App. 523, 233 S.E.2d 878 (1977); *Smith v. Forrester*, 145 Ga. App. 281, 243 S.E.2d 575 (1978); *Bozard v. J.A. Jones Constr. Co.*, 146 Ga. App. 877, 247 S.E.2d 605 (1978); *Young v. Jones*, 147 Ga. App. 65, 248 S.E.2d 49 (1978); *Strother v. C. & S. Nat'l Bank*, 147 Ga. App. 140, 248 S.E.2d 204 (1978); *Hester v. State*, 242 Ga. 173, 249 S.E.2d 547 (1978); *Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc.*, 147 Ga. App. 590, 249 S.E.2d 631 (1978); *Albert v. Bryan*, 150 Ga. App. 649, 258 S.E.2d 300 (1979); *Canup v. State*, 150 Ga. App. 794, 258 S.E.2d 907 (1979); *Sheehan v. Sheehan*, 244 Ga. 367, 260 S.E.2d 77 (1979); *Music v. State*, 244 Ga. 832, 262 S.E.2d 128 (1979); *Middleton v. Continental Dev. Corp.*, 153 Ga. App. 144, 264 S.E.2d 689 (1980); *Dampier v. First Bank & Trust Co.*, 153 Ga. App. 756, 266 S.E.2d 539 (1980); *Freeman v. State*, 154 Ga. App. 344, 268 S.E.2d 727 (1980); *State v. Hart*, 246 Ga. 212, 271 S.E.2d 133 (1980); *Dunn v. State*, 156 Ga. App. 483, 274 S.E.2d 828 (1980); *Forrester v. Ladwig*, 247 Ga. 426, 276 S.E.2d 613 (1981); *Black v. Georgia Power Co.*, 158 Ga. App. 620, 281 S.E.2d 639 (1981); *Hardin v. Macon Mall*, 159 Ga. App. 139, 282 S.E.2d 753 (1981); *Washington v. State*, 158 Ga. App. 829, 282 S.E.2d 776 (1981); *Godfrey v. Kirk*, 161 Ga. App. 474, 288 S.E.2d 301 (1982); *Stavrou v. Pleger*, 249 Ga. 475, 291 S.E.2d 514 (1982); *Raymond v. State*, 162 Ga. App. 493, 292 S.E.2d 196 (1982); *Freeman v. Gold & White, Inc.*, 163 Ga. App. 467, 294 S.E.2d 718 (1982); *Morton v. Morton*, 163 Ga. App. 830, 296 S.E.2d 362 (1982); *Sayre v. State*, 165 Ga. App. 225, 299 S.E.2d 749 (1983); *Curtis v. State*, 168 Ga. App. 235, 308 S.E.2d 599

(1983); *In re G.W.H.*, 168 Ga. App. 845, 310 S.E.2d 573 (1983); *Rimes v. State*, 182 Ga. App. 721, 356 S.E.2d 897 (1987); *Georgia Am. Ins. Co. v. Varnum*, 182 Ga. App. 907, 357 S.E.2d 609 (1987); *Willis v. State*, 186 Ga. App. 197, 366 S.E.2d 778 (1988); *Waite v. Harvey*, 187 Ga. App. 276, 370 S.E.2d 34 (1988); *McKinney v. State*, 187 Ga. App. 702, 371 S.E.2d 196 (1988); *Aldridge v. State*, 188 Ga. App. 729, 374 S.E.2d 223 (1988); *Jones v. Perkins*, 192 Ga. App. 343, 384 S.E.2d 927 (1989); *Baker v. Southern Ry.*, 260 Ga. 115, 390 S.E.2d 576 (1990); *Baker v. State*, 195 Ga. App. 424, 394 S.E.2d 801 (1990); *Walker v. State*, 197 Ga. App. 265, 398 S.E.2d 217 (1990); *Hunter v. Roberts*, 199 Ga. App. 318, 404 S.E.2d 645 (1991); *Pinkney v. Union*, 199 Ga. App. 529, 405 S.E.2d 521 (1991); *Hall v. Bussey*, 200 Ga. App. 311, 408 S.E.2d 430 (1991); *Trinity v. Applebee's Neighborhood Grill & Bar*, 201 Ga. App. 404, 411 S.E.2d 131 (1991); *Snell v. State*, 203 Ga. App. 27, 416 S.E.2d 360 (1992); *Beavers v. Gilstrap*, 210 Ga. App. 46, 435 S.E.2d 267 (1993).

Timeliness of Application

Applies to application not to grant of extension. — Section provides only that application for extension be made before expiration of period, and does not impose penalty of dismissal where application has been made but no extension granted before expiration of 30 days. *Elliott v. Leathers*, 223 Ga. 497, 156 S.E.2d 440 (1967).

Failure to apply for extension before expiration of period for filing. — Section provides that application for extension of time must be made before expiration of period for filing; where appellant did not comply with this provision, order granting extension of time for filing was nugatory and void. *Almond v. Robertson*, 138 Ga. App. 22, 225 S.E.2d 486 (1976).

Trial court has no jurisdiction to grant extension of time for filing notice of appeal where application for extension is not made before expiration of 30-day period prescribed by § 5-6-38. *Morris v. State*, 115 Ga. App. 715, 155 S.E.2d 735 (1967).

Nunc pro tunc order cannot correct failure to timely make application. *Baxter v. Long*, 122 Ga. App. 500, 177 S.E.2d 712 (1970); *Gilmore v. State*, 127 Ga. App. 249, 193 S.E.2d 219 (1972), overruled on other

Timeliness of Application (Cont'd)

grounds, *Gilman Paper Co. v. James*, 235 Ga. 348, 219 S.E.2d 447 (1975).

Orders granting extensions of time for filing of transcript of evidence and proceedings on appeal cannot be granted nunc pro tunc on delayed application. *Mingo v. State*, 133 Ga. App. 385, 210 S.E.2d 835 (1974).

Immediate signature or order unnecessary. — If application is timely presented to court, it does not have to be signed immediately by judge as order may be entered after expiration of the period. *Gilmore v. State*, 127 Ga. App. 249, 193 S.E.2d 219 (1972), overruled on other grounds, *Gilman Paper Co. v. James*, 235 Ga. 348, 219 S.E.2d 447 (1975).

If application is made within time required, it is immaterial that order is later entered. *Baxter v. Long*, 122 Ga. App. 500, 177 S.E.2d 712 (1970).

Fact that written order granting extension was not entered until over a month after court's previously ordered filing date does not invalidate extension, since said order vacated all previous orders and indicated prior, implicit extensions as of said previous filing date. *Morris v. Townsend*, 118 Ga. App. 572, 164 S.E.2d 869 (1968).

No dismissal where appellant does not cause delay and judge denies extension. — To construe this section as requiring dismissal where appellant did not cause delay and trial judge declined to grant requested extension would shut off right of appeal, and would thus violate the constitutional mandate of Ga. Const. 1976, Art. VI, Sec. II, Para. V (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II). Such construction would also be contrary to the legislative intent expressed in §§ 5-6-30 and 5-6-48(b) of this article as to decision upon merits. *Elliott v. Leathers*, 223 Ga. 497, 156 S.E.2d 440 (1967).

Delay is attributable to appellant. — Failure to make timely application as section requires is delay attributable to appellant. *Baxter v. Long*, 122 Ga. App. 500, 177 S.E.2d 712 (1970).

Obtaining of extension does not per se excuse appellant from consequences. — Nothing in statutes or decisions provides that obtaining of extensions per se excuses appellant from consequences of his own unreasonable delay. *Cox Enters., Inc. v.*

Southland, Inc., 226 Ga. 794, 177 S.E.2d 653 (1970), cert. denied, 401 U.S. 993, 91 S. Ct. 1231, 28 L. Ed. 2d 531 (1971).

Party cannot amend new trial motion after 30 days to move for judgment n.o.v. — Where party, after suffering an adverse judgment, filed only a motion for new trial within 30-day period specified in § 9-11-50, then after the 30-day period expired party sought to file, in the form of an amendment to the new trial motion, a motion for judgment notwithstanding the verdict, the latter motion must be considered invalid. *Preferred Risk Ins. Co. v. Boykin*, 174 Ga. App. 269, 329 S.E.2d 900, cert. denied, 254 Ga. 349, 331 S.E.2d 879 (1985).

Grants of Extensions**1. Notice of Appeal**

Computation of maximum extension allowable. — Under this section, neither trial court nor appeals court has jurisdiction to grant extension of more than 30 days for filing of notice of appeal, unless last day of filing falls on Saturday or Sunday, in which event time for filing is extended through following Monday pursuant to § 1-3-1. *Smith v. Smith*, 113 Ga. App. 111, 147 S.E.2d 466 (1966); *Rockdale County v. Water Rights Comm., Inc.*, 189 Ga. App. 873, 377 S.E.2d 730 (1989).

Order granting 90 days to perfect appeal. — Order of trial court granting defendant 90 days within which to perfect appeal due to unavailability of transcript, if intended to be a grant of an extension of time for filing of notice of appeal, was an ineffective nullity insofar as it purported to grant extension for a period of time greater than 30 days as such extension in excess of 30 days violates this section. *Parker v. State*, 156 Ga. App. 299, 274 S.E.2d 694 (1980).

Motion for reconsidering order granting summary judgment and dismissing counterclaim. — For Court of Appeals to acquire jurisdiction over case, notice of appeal must be filed within 30 days of entry of judgment appealed from, unless extension is granted upon proper application to trial court, and motion for reconsideration of order granting summary judgment and dismissing counterclaim does not extend deadline for filing notice of appeal from that order. *Peppers House Restaurant, Inc. v. Siefferman*, 156

Ga. App. 114, 274 S.E.2d 43 (1980).

Reaffirmance of dismissal of counterclaim. — Where the time for filing the notice of appeal runs from the date of the voluntary dismissal of the appellees' counterclaims, the trial court is powerless to extend the time by entering a subsequent order reaffirming the dismissal of the complaint, even had it intended to do so. *Caswell v. Caswell*, 157 Ga. App. 710, 278 S.E.2d 452 (1981).

Filing during unauthorized second extension. — Under this section, trial court is authorized to grant only one extension of time for filing of notice of appeal; thus, filing of notice of appeal during unauthorized second extension comes too late to satisfy requirement of § 5-6-48. *Hamby v. State*, 162 Ga. App. 348, 291 S.E.2d 724 (1982).

Deadline not extended by motion to vacate summary judgment. — Party's motion to vacate a grant of summary judgment for the opposing party did nothing to extend the deadline for filing a notice of appeal from the order granting the summary judgment. *Thompson v. GMAC*, 194 Ga. App. 526, 391 S.E.2d 2 (1990).

Untimely request for extension. — Plaintiff's request for an extension on the basis of inability to pay costs, filed a month after receiving the bill, was untimely, and his belated payment of costs did not eliminate the court's authority to determine the reasonableness and excusability of the payment delay, in ruling on dismissal. *Hooper v. Southern Bell Tel. & Tel. Co.*, 195 Ga. App. 629, 394 S.E.2d 798 (1990).

2. Transcripts

Burden is on appellant to request extension for filing transcript, and this burden

cannot be shifted to court reporter by implying latter's duty to apply for extension. *Dunbar v. Green*, 232 Ga. 188, 205 S.E.2d 854 (1974).

Unless the delay is caused by appellant, failure to timely file a transcript shall not work dismissal. *Morris v. Townsend*, 118 Ga. App. 572, 164 S.E.2d 869 (1968).

Delay must have been unreasonable and inexcusable. — Failure of the appellant to request an extension for the filing of the transcript is not in itself a ground for dismissal of the appeal absent a judicial determination that the resulting delay was both unreasonable and inexcusable. *McGuirt v. Lawrence*, 193 Ga. App. 611, 389 S.E.2d 2 (1989).

Where clerk is unable to timely transmit record. — Section 5-6-43 follows Constitution by stating that case shall not be dismissed if clerk is unable to transmit record within time required by statute or when judge grants extension of time, and he shall attach his certificate attesting to cause of delay. *George v. American Credit Control, Inc.*, 222 Ga. 512, 150 S.E.2d 683 (1966).

Determination of whether to grant extension without notice or hearing. — Court reporter is amenable to trial judge for prompt and efficient performance of his duties. This relationship ordinarily provides judge with sufficient facts upon which to decide whether to grant or deny application for extension of time to file transcript without necessity of notice and hearing. *Rogers v. McDonald*, 226 Ga. 329, 175 S.E.2d 25 (1970).

RESEARCH REFERENCES

C.J.S. — 4A C.J.S., Appeal and Error, §§ 290-294.

ALR. — Power of trial court indirectly to extend time for appeal, 89 ALR 941; 149 ALR 740.

Lower court's consideration, on the merits, of unreasonable application for new trial, rehearing, or other re-examination, as affecting time in which to apply for appellate review, 148 ALR 795.

Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted, 10 ALR2d 1075.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 ALR2d 482.

5-6-40. Enumeration of errors.

The appellant and cross appellant shall file with the clerk of the appellate court, at such time as may be prescribed by its rules, an enumeration of the errors which shall set out separately each error relied upon. The enumeration shall be concise and need not set out or refer to portions of the record on appeal. It shall be served upon the appellee or cross appellee in the manner prescribed in Code Section 5-6-32, need not have approval of the trial court, and when filed shall become a part of the record on appeal. The appellate court, by rule, may permit the enumeration to be made a part of the brief. (Ga. L. 1965, p. 18, § 14; Ga. L. 1965, p. 240, § 2; Ga. L. 1968, p. 1072, § 8.)

Cross references. — Briefs of appellant and cross appellant, Rules of the Supreme Court of the State of Georgia, Rule 39. Service on opposing parties, Rules of the Supreme Court of the State of Georgia, Rule 43. Argument and citation of authority, Rules of the Supreme Court of the State of Georgia, Rule 45. Judgments deemed included and presented, Rules of the Supreme Court of the State of Georgia, Rule 46. Filing of enumeration of errors, Rules of the Court of Appeals of the State of Georgia, Rule 5. Structure and content of appellate brief, Rules of the Court of Appeals of the State of

Georgia, Rule 15. Filing, preparation, and service of enumeration of errors, Rules of the Court of Appeals of the State of Georgia, Rule 27.

Law reviews. — For note discussing the reluctance of Georgia courts to grant appeals as allowed under this article and Ch. 11, T. 9 when overruled motion for new trial not enumerated as error in light of *Hill v. Willis*, 224 Ga. 263, 161 S.E.2d 281 (1968), see 5 Ga. St. B.J. 269 (1968).

For comment on *Crider v. State*, 115 Ga. App. 347, 154 S.E.2d 743 (1967), see 4 Ga. St. B.J. 265 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

WHAT MAY BE ENUMERATED AS ERROR

CONTENT AND FORM OF ENUMERATION

1. IN GENERAL

2. APPLICATION

FILING OF ENUMERATION

General Consideration

Appellate review is limited to grounds presented to and ruled upon by trial court. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Objection urged below, but not argued on appeal, must be treated as abandoned. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

No jurisdiction over inadequately enumerated grounds. — Appellate court lacks jurisdiction to consider grounds, which though argued, are not enumerated as required. *Slaughter v. Linder*, 122 Ga. App. 144, 176

S.E.2d 450 (1970); *Meeks v. State*, 178 Ga. App. 9, 341 S.E.2d 880 (1986).

Although presented in brief, any error not enumerated shall be disregarded. *Rider v. State*, 226 Ga. 14, 172 S.E.2d 318 (1970); *Slaughter v. Linder*, 122 Ga. App. 144, 176 S.E.2d 450 (1970).

Assignments of error in brief cannot take place of enumeration of errors required by section. *Benfield v. State*, 224 Ga. 139, 160 S.E.2d 398 (1968); *Craig v. State*, 130 Ga. App. 689, 204 S.E.2d 307 (1974).

Even though alleged error was raised at trial, an adverse ruling received, and it is

argued in brief, appellate courts will not consider it unless it is within enumerated error. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

The Court of Appeals has no jurisdiction to consider grounds which though argued are not enumerated as error according to this section. *Sanders v. Hughes*, 183 Ga. App. 601, 359 S.E.2d 396, cert. denied, 183 Ga. App. 907, 359 S.E.2d 396 (1987).

Matter raised in appellate brief will not be considered when the issue was not enumerated as error. *Dean v. State*, 163 Ga. App. 29, 293 S.E.2d 492 (1982); *Smith v. State*, 186 Ga. App. 303, 367 S.E.2d 573 (1988).

Alleged error raised for first time on brief, cannot be considered by appellate courts, for enumeration must fairly encompass error alleged to have been made at trial. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Review of assertions of error. — Although appellate court could refuse to address any error not set out separately, the court may in its sound discretion elect to review any one or more of the assertions of error contained in a single enumeration and treat the rest as abandoned. *Morris v. State Farm Mut. Auto. Ins. Co.*, 203 Ga. App. 839, 418 S.E.2d 119 (1992).

Enumerations of error may not be amended after time for filing has expired. *Burke v. State*, 153 Ga. App. 769, 266 S.E.2d 549 (1980); *Parham v. State*, 166 Ga. App. 855, 305 S.E.2d 599 (1983).

Any attempt to amend or enlarge an enumeration upon appeal will not be permitted. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Enumerations of error cannot be enlarged by statements in brief to include issues not made in former. *Leniston v. Bonfiglio*, 138 Ga. App. 151, 226 S.E.2d 1 (1976).

Burden is on party alleging error to show it affirmatively by the record. *Moye v. State*, 127 Ga. App. 338, 193 S.E.2d 562 (1972).

Error must appear from record sent to appellate court by clerk of trial court. *Moye v. State*, 127 Ga. App. 338, 193 S.E.2d 562 (1972).

Any error shown upon record must stand or fall on its own merits and is not aided by accumulative effect of other claims of error. *Hess Oil & Chem. Corp. v. Nash*, 226 Ga. 706, 177 S.E.2d 70 (1970), cert. denied, 403

U.S. 922, 91 S. Ct. 2241, 29 L. Ed. 2d 700 (1971).

Where defendant fails to provide transcript, appellate court must assume trial findings were authorized by evidence. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Testimony set forth in brief but not objected to at trial. — The portion of the testimony by a witness at trial contained in defendant's brief but unobjected to at the trial may not be asserted as error for the first time on appeal. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981).

Cited in *Stanford v. Evans*, Reed & Williams, 221 Ga. 331, 145 S.E.2d 504 (1965); *Davenport v. Hall*, 221 Ga. 543, 145 S.E.2d 558 (1965); *Hayes v. Strickland*, 112 Ga. App. 567, 145 S.E.2d 728 (1965); *Undercofler v. McLennan*, 221 Ga. 613, 146 S.E.2d 635 (1966); *Banks v. Banks*, 221 Ga. 626, 146 S.E.2d 636 (1966); *Cade v. Burson*, 221 Ga. 715, 146 S.E.2d 761 (1966); *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966); *Jones v. Spindel*, 113 Ga. App. 191, 147 S.E.2d 615 (1966); *Coile v. Finance Co. of Am.*, 221 Ga. 863, 148 S.E.2d 328 (1966); *Adams v. Morgan*, 114 Ga. App. 180, 150 S.E.2d 556 (1966); *Puckett v. Puckett*, 222 Ga. 653, 151 S.E.2d 767 (1966); *Hutchinson v. Georgia Power Co.*, 115 Ga. App. 666, 155 S.E.2d 643 (1967); *Calhoun v. Patrick*, 116 Ga. App. 303, 157 S.E.2d 31 (1967); *Aetna Life Ins. Co. v. Greene*, 116 Ga. App. 783, 159 S.E.2d 87 (1967); *DeFee v. Williams*, 224 Ga. 354, 162 S.E.2d 440 (1968); *Kelley v. Holy Family Hosp. & Medical Ctr., Inc.*, 224 Ga. 641, 163 S.E.2d 716 (1968); *Kay v. Vaughan*, 224 Ga. 875, 165 S.E.2d 131 (1968); *Dawson v. Garner*, 119 Ga. App. 469, 167 S.E.2d 741 (1969); *Smith v. Smith*, 225 Ga. 474, 169 S.E.2d 820 (1969); *Samples v. Hatcher*, 225 Ga. 483, 170 S.E.2d 27 (1969); *Brown v. Smith*, 225 Ga. 496, 170 S.E.2d 28 (1969); *Hatton v. State*, 226 Ga. 18, 172 S.E.2d 427 (1970); *Hull v. Campbell*, 130 Ga. App. 637, 204 S.E.2d 312 (1974); *Parris v. Slaton*, 131 Ga. App. 92, 205 S.E.2d 67 (1974); *Taylor v. Columbia County Planning Comm'n*, 232 Ga. 155, 205 S.E.2d 287 (1974); *Banks v. State*, 131 Ga. App. 215, 205 S.E.2d 520 (1974); *Lowe v. Royal Crown Cola Co.*, 132 Ga. App. 37, 207 S.E.2d 620 (1974); *Doyal v. Ben O'Callaghan Co.*, 132 Ga. App. 336, 208 S.E.2d 136 (1974); *Pritchett v. State*,

General Consideration (Cont'd)

134 Ga. App. 254, 214 S.E.2d 180 (1975); *Brown v. State*, 236 Ga. 333, 223 S.E.2d 642 (1976); *Grant v. State*, 139 Ga. App. 793, 229 S.E.2d 674 (1976); *Nipper v. Crisp County*, 141 Ga. App. 312, 233 S.E.2d 270 (1977); *Atlanta Whses., Inc. v. Housing Auth.*, 143 Ga. App. 588, 239 S.E.2d 387 (1977); *Duke v. State*, 147 Ga. App. 101, 248 S.E.2d 176 (1978); *Haynes v. Hoffman*, 164 Ga. App. 236, 296 S.E.2d 216 (1982); *Georgia Dep't of Labor v. Sims*, 164 Ga. App. 856, 298 S.E.2d 562 (1982); *Strickland v. State*, 165 Ga. App. 197, 300 S.E.2d 537 (1983); *Eunice v. Citicorp Homeowners, Inc.*, 167 Ga. App. 335, 306 S.E.2d 395 (1983); *Whisenhunt v. State*, 172 Ga. App. 742, 324 S.E.2d 570 (1984); *Hester v. Baker*, 180 Ga. App. 627, 349 S.E.2d 834 (1986); *Holmes v. State*, 180 Ga. App. 787, 350 S.E.2d 497 (1986); *California Fed. Sav. & Loan Ass'n v. Hudson*, 185 Ga. App. 384, 364 S.E.2d 582 (1987); *Palmer v. State*, 186 Ga. App. 892, 369 S.E.2d 38 (1988); *Bryant v. BMC of Ga., Inc.*, 188 Ga. App. 124, 372 S.E.2d 280 (1988); *Floyd v. State*, 188 Ga. App. 24, 372 S.E.2d 287 (1988); *Johncox v. State*, 189 Ga. App. 188, 375 S.E.2d 139 (1988); *Brown v. State*, 190 Ga. App. 324, 378 S.E.2d 908 (1989); *Seligman v. Milam Bldrs., Inc.*, 191 Ga. App. 224, 381 S.E.2d 401 (1989); *Hoffer v. State*, 192 Ga. App. 378, 384 S.E.2d 902 (1989); *Boatright v. State*, 192 Ga. App. 112, 385 S.E.2d 298 (1989); *Seabolt v. Edghill*, 192 Ga. App. 715, 386 S.E.2d 376 (1989); *Fulton County v. Collum Properties, Inc.*, 193 Ga. App. 774, 388 S.E.2d 916 (1989); *Sentry Ins. v. Majeed*, 194 Ga. App. 276, 390 S.E.2d 269 (1990); *Murphy v. State*, 195 Ga. App. 878, 395 S.E.2d 76 (1990); *Allain v. State*, 202 Ga. App. 706, 415 S.E.2d 315 (1992); *Campbell v. State*, 207 Ga. App. 902, 429 S.E.2d 538 (1993); *Johnson v. State*, 212 Ga. App. 190, 441 S.E.2d 509 (1994); *Obiozor v. State*, 213 Ga. App. 523, 445 S.E.2d 553 (1994).

What May Be Enumerated As Error

Only alleged errors occurring in lower court may be enumerated in appeal, and a statute may not be constitutionally attacked for first time in enumerations of error so as to give Supreme Court jurisdiction of appeal. *Kohl v. Manning*, 223 Ga. 755, 158 S.E.2d 375 (1967).

Any ruling or judgment of court affecting judgment appealed from may be enumerated as error by the appellant. *Allen v. Rome Kraft Co.*, 114 Ga. App. 717, 152 S.E.2d 618 (1966).

Overruling of motion for new trial does affect judgment on verdict, and may be enumerated. *Allen v. Rome Kraft Co.*, 114 Ga. App. 717, 152 S.E.2d 618 (1966).

Content and Form of Enumeration

1. In General

Each enumeration may contain only one error. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980); *Garvey v. State*, 176 Ga. App. 268, 335 S.E.2d 640 (1985); *Hayes v. State*, 189 Ga. App. 39, 375 S.E.2d 114 (1988).

On appeal each enumeration of error should address only one error. *Pope v. Triangle Chem. Co.*, 157 Ga. App. 386, 277 S.E.2d 758 (1981).

Where there are two separate bases for the argument made, each ground should be separately enumerated. *Bounds v. State*, 207 Ga. App. 665, 428 S.E.2d 673 (1993).

Must clearly appear. — It is desirable that each enumeration be explicit, precise, intelligible, unambiguous, unmistakable, and unequivocal. But, a degree of generality may be tolerated. This is not to be used as a sword against an appellee to enlarge or amend an enumeration of error, or to encompass bases of objection not fairly included within legitimate parameters urged at trial, but is a shield to accommodate appeal of specific allegation of error. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Each enumeration should be concise. *Dean v. State*, 163 Ga. App. 29, 293 S.E.2d 492 (1982).

Subject matter of enumeration need be indicated only in a general way. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Sufficiency of enumeration. — The correct rule with respect to the legal sufficiency of any enumeration of error is that it need be only sufficient to point out the error complained of. *Childers v. Tauber*, 160 Ga. App. 713, 288 S.E.2d 5 (1981).

Effect of several assertions of error in single enumeration. — The Court of Appeals

may, in the exercise of its sound discretion, elect to review any one or more of the several assertions of error contained within a single enumeration and to treat the remaining assertions of error therein as abandoned. *West v. Nodvin*, 196 Ga. App. 825, 397 S.E.2d 567 (1990).

When an appellant argues more than one error within a single enumeration, the appellate court in its discretion may elect to review none of the errors enumerated in violation of this Code section, or may elect to review any one or more of the several assertions of error contained within the single enumeration and treat the remaining assertions of error therein as abandoned. *Robinson v. State*, 200 Ga. App. 515, 408 S.E.2d 820 (1991).

Where it is apparent what errors are sought to be asserted, appeal shall be considered. — Where it is apparent from notice of appeal, record, enumeration of errors, or any combination of the foregoing, what errors are sought to be asserted upon appeal, appeal shall be considered notwithstanding that enumeration of errors fails to enumerate clearly the errors sought to be reviewed. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Enumerated errors may still be ruled insufficient or held not to be meritorious from the record, even though they are in the proper form. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

2. Application

Editor's notes. — In light of the similarity of the issues dealt with by the provisions, decisions under former Penal Code 1910, former Civil Code 1910, § 6332, former Code 1933, § 6-901 as it read prior to revision by Ga. L. 1965, p. 18, § 14, and former Code 1933, § 6-1607 are included in the annotations below.

Vague enumeration may still be sufficient. — Motion to strike appellant's enumeration of error should be denied, where, though hazy, it still conforms to practically unlimited looseness authorized by section. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Effect of enumeration of error which is too vague. — When enumerated error is so general and does not contain a key which the brief clarifies to identify specific error

enumerated, and neither record nor notice of appeal assists in determining which one specific error is enumerated, appellate court will consider only the general grounds as to sufficiency of facts to support judgment. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Appeal not dismissed for erroneous reference. — Motion to dismiss appeal is not meritorious where based upon fact that enumeration of errors refers to wrong date as to order it complains of but where notice of appeal refers to correct date in record. *Langford v. First Nat'l Bank*, 122 Ga. App. 210, 176 S.E.2d 484 (1970).

Enumeration setting forth each demurrer by its paragraph number. — Requirement that enumeration of error set out separately errors relied upon does not make necessary a separate numbering as to each of various numbered demurrers (now motions to dismiss) sustained, but an enumeration of error on sustaining of such demurrers setting forth each demurrer by its paragraph number is sufficient. *Mull v. Emory Univ., Inc.*, 114 Ga. App. 63, 150 S.E.2d 276 (1966).

Where record includes motion. — In appeal from judgment of trial court overruling appellant-condemnor's motion for new trial, mere enumeration of judgment as error, without separately enumerating as error each ground of such motion, is sufficient compliance with section where motion as amended is included in record and where appellant's brief argues each ground separately. *City of Douglas v. Rigdon*, 116 Ga. App. 306, 157 S.E.2d 66 (1967).

Raising inadequacy of damages by enumerating general grounds of motion for new trial. — Although good practice would call for enumerating as error the inadequacy of jury's verdict for damages, question of inadequacy is sufficiently raised for consideration by court where overruling of general grounds of motion for new trial is enumerated as error, and question of inadequacy of verdict is presented and argued in briefs. *Kirkman v. Miller*, 116 Ga. App. 78, 156 S.E.2d 558 (1967).

Mere general enumeration to denial of amended motion for new trial is insufficient. *Dean v. State*, 163 Ga. App. 29, 293 S.E.2d 492 (1982).

One enumeration is sufficient to reach all grounds. — Where error alleged is in grant-

Content and Form of**Enumeration (Cont'd)****2. Application (Cont'd)**

ing or denying of a new trial, one assignment of error is sufficient to reach all grounds of the motion on which grant or refusal was based. *National Union Fire Ins. Co. v. Ozburn*, 42 Ga. App. 393, 156 S.E. 305 (1930) (decided under former Civil Code 1910, § 6332).

Exception to sufficiency of evidence where error concerns sufficiency of petition.

— Where plaintiff's failure to recover is dependent not upon insufficiency of evidence, but upon insufficiency of the petition, manifestly an assignment of error even in a direct bill of exceptions (see §§ 5-6-49, 5-6-50) in which insufficiency of the petition can be reached, which excepts only to sufficiency of evidence and does not except to sufficiency of the petition, is insufficient to present for decision any question respecting insufficiency of the petition to set out a cause of action; although it would be otherwise, perhaps, if it appeared affirmatively from the petition that plaintiff was not entitled to recover. *Huson v. Farmer*, 53 Ga. App. 131, 185 S.E. 119 (1936) (decided under former Code 1933, § 6-901).

Enumeration regarding admission of allegedly prejudicial evidence. — Enumeration of error upon admission of evidence complaining that same creates false and prejudicial issue, in order to be complete, must set out how evidence was prejudicial and what false issue was created. *Essig v. Cheves*, 75 Ga. App. 870, 44 S.E.2d 712 (1947) (decided under former Code 1933, § 6-1607).

Complaint that illegal rulings were made without setting out nature of rulings, is insufficient as an assignment of error. *Harbour v. Rittenbaum*, 101 Ga. App. 878, 115 S.E.2d 573 (1960) (decided under former Code 1933, § 6-901).

General exception to entire charge is too broad where whole charge is not erroneous. *Cheek v. State*, 22 Ga. App. 788, 97 S.E. 203 (1918) (decided under former Penal Code 1910, § 1097).

Assignment of error based on statement of fact which is denied in answer cannot be considered. *Jones v. City of Rome*, 15 Ga. App. 41, 82 S.E. 593 (1914) (decided under

former Penal Code 1910, § 1097).

Filing of Enumeration

Failure to file enumeration of errors, as required by section, requires dismissal of appeal. *Lowery v. Smith*, 225 Ga. 814, 171 S.E.2d 500 (1969).

Failure to file enumeration within time specified may be deemed as failure to complete appeal. *Watson v. Stynchcombe*, 228 Ga. 193, 184 S.E.2d 580 (1971); *Seigler v. Smith*, 228 Ga. 270, 185 S.E.2d 377 (1971).

Where enumeration of errors not timely filed and no extension granted. — Absent filing of enumeration of errors within time prescribed or, in the alternative, absent grant of extension of time on motion made before expiration of such time, appeal has not been perfected and must be dismissed. *Thomas v. State*, 118 Ga. App. 748, 165 S.E.2d 477 (1968).

Timely filed enumeration of errors not affected by nonpayment. — Where enumeration of errors was filed within time required for filing briefs, fact that brief was not marked "filed" within that time due to nonpayment of costs does not invalidate filing of enumeration of errors. *Norton Realty & Loan Co. v. City of Gainesville*, 224 Ga. 166, 160 S.E.2d 819 (1968).

Where providential cause is shown, late filing of enumerations of error will not necessarily cause dismissal of appeal. *Thomas v. State*, 118 Ga. App. 748, 165 S.E.2d 477 (1968).

Enumeration of error must be filed at time brief is filed. *Herrin v. Herrin*, 225 Ga. 692, 171 S.E.2d 143 (1969).

Enumerations of error are required to be filed separately from brief. — Incorporation of enumerations of error in brief fails to comply with this rule and presents nothing for review by appellate court. *Russell v. State*, 225 Ga. 371, 169 S.E.2d 124 (1969).

Failure to file copy of enumeration of error with clerk will not vitiate appeal. Requirement for filing copy of enumeration of error with clerk of trial court is not jurisdictional, and failure to follow this procedural requirement will not vitiate an appeal. *Calloway v. State*, 115 Ga. App. 158, 154 S.E.2d 291 (1967).

Failure to file copy of enumeration of errors with clerk of trial court is not ground for dismissal of appeal. *Stark v. Lanier*, 115

Ga. App. 229, 154 S.E.2d 289 (1967); Norton Realty & Loan Co. v. City of Gainesville, 224 Ga. 166, 160 S.E.2d 819 (1968).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, §§ 648-677.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 446, 458-460.

ALR. — Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 ALR 725.

5-6-41. Reporting, preparation, and disposition of transcript; correction of omissions or misstatements; preparation of transcript from recollections; filing of disallowed papers; filing of stipulations in lieu of transcript; reporting at party's expense.

(a) In all felony cases, the transcript of evidence and proceedings shall be reported and prepared by a court reporter as provided in Code Section 17-8-5 or as otherwise provided by law.

(b) In all misdemeanor cases, the trial judge may, in the judge's discretion, require the reporting and transcribing of the evidence and proceedings by a court reporter on terms prescribed by the trial judge.

(c) In all civil cases tried in the superior and city courts and in any other court, the judgments of which are subject to review by the Supreme Court or the Court of Appeals, the trial judge thereof may require the parties to have the proceedings and evidence reported by a court reporter, the costs thereof to be borne equally between them; and, where an appeal is taken which draws in question the transcript of the evidence and proceedings, it shall be the duty of the appellant to have the transcript prepared at the appellant's expense. Where it is determined that the parties, or either of them, are financially unable to pay the costs of reporting or transcribing, the judge may, in the judge's discretion, authorize trial of the case unreported; and, when it becomes necessary for a transcript of the evidence and proceedings to be prepared, it shall be the duty of the moving party to prepare the transcript from recollection or otherwise.

(d) Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, evidence, whether admitted or stricken on objection or otherwise, copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called in question on appeal or other posttrial procedure shall be reported; and, where the report is transcribed, all such matters shall be included in the written transcript, it being the intention of this article that all these matters appear in the record. Where matters occur which were not reported, such as objections to oral argument, misconduct of the jury, or other like instances, the court, upon motion of either party, shall require that a transcript of these matters be made and included as a part of the record. The transcript of proceedings shall not be reduced to narrative

form unless by agreement of counsel; but, where the trial is not reported or the transcript of the proceedings for any other reason is not available and the evidence is prepared from recollection, it may be prepared in narrative form.

(e) Where a civil or criminal trial is reported by a court reporter and the evidence and proceedings are transcribed, the reporter shall complete the transcript and file the original and one copy thereof with the clerk of the trial court, together with the court reporter's certificate attesting to the correctness thereof. In criminal cases where the accused was convicted of a capital felony, an additional copy shall be filed for the Attorney General, for which the court reporter shall receive compensation from the Department of Law as provided by law. The original transcript shall be transmitted to the appellate court as a part of the record on appeal; and one copy will be retained in the trial court, both as referred to in Code Section 5-6-43. Upon filing by the reporter, the transcript shall become a part of the record in the case and need not be approved by the trial judge.

(f) Where any party contends that the transcript or record does not truly or fully disclose what transpired in the trial court and the parties are unable to agree thereon, the trial court shall set the matter down for a hearing with notice to both parties and resolve the difference so as to make the record conform to the truth. If anything material to either party is omitted from the record on appeal or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected and, if necessary, that a supplemental record shall be certified and transmitted by the clerk of the trial court. The trial court or the appellate court may at any time order the clerk of the trial court to send up any original papers or exhibits in the case, to be returned after final disposition of the appeal.

(g) Where a trial is not reported as referred to in subsections (b) and (c) of this Code section or where for any other reason the transcript of the proceedings is not obtainable and a transcript of evidence and proceedings is prepared from recollection, the agreement of the parties thereto or their counsel, entered thereon, shall entitle such transcript to be filed as a part of the record in the same manner and with the same binding effect as a transcript filed by the court reporter as referred to in subsection (e) of this Code section. In case of the inability of the parties to agree as to the correctness of such transcript, the decision of the trial judge thereon shall be final and not subject to review; and, if the trial judge is unable to recall what transpired, the judge shall enter an order stating that fact.

(h) Where any amendment or other pleading or paper which requires approval or sanction of the court in any proceeding before being filed of record is disallowed or sanction thereof is refused, the amendment, pleading, or paper may nevertheless be filed, with notation of disallowance

thereon, and shall become part of the record for purposes of consideration on appeal or other procedure for review.

(i) In lieu of sending up a transcript of record, the parties may by agreement file a stipulation of the case showing how the questions arose and were decided in the trial court, together with a sufficient statement of facts to enable the appellate court to pass upon the questions presented therein. Before being transmitted to the appellate court, the stipulation shall be approved by the trial judge or the presiding judge of the court where the case is pending.

(j) In all cases, civil or criminal, any party may as a matter of right have the case reported at the party's own expense. (Ga. L. 1965, p. 18, § 10; Ga. L. 1993, p. 1315, § 1.)

The 1993 amendment, effective July 1, 1993, in subsection (a), inserted "by a court reporter"; in subsection (b), substituted "the judge's" for "his", inserted "by a court reporter", and substituted "the trial judge" for "him"; in subsection (c), in the first sentence, inserted "by a court reporter" and substituted "the appellant's" for "his" and in the second sentence, substituted "the judge's" for "his"; in subsection (d), in the first sentence, inserted a comma following "evidence" and deleted the parentheses around the phrase "whether admitted or stricken on objection or otherwise"; in subsection (e), in the first sentence, substituted "the court reporter's" for "his"; in subsection (g), in the second sentence, substituted "the judge" for "he"; in subsection (h), inserted commas following "filed" and "thereon" and deleted the parentheses around the phrase "with notation of disallowance thereon"; and, in subsection (j), substituted "the party's" for "his".

Cross references. — Powers and duties of Judicial Council with regard to reporting of judicial proceedings, § 15-5-20 et seq. Court reporters generally, Ch. 14, T. 15. Filings in

clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Contents, form, and certification of transcript, Rules of the Supreme Court of the State of Georgia, Rule 18. Submission of physical evidence, Rules of the Supreme Court of the State of Georgia, Rule 19. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Presenting issue where record supplemented, Rules of the Supreme Court of the State of Georgia, Rule 48. Preparation of records and transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 42. Transmission of transcript, Rules of the Court of Appeals of the State of Georgia, Rule 44. Objections to records or transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 47.

Law reviews. — For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For article, "Let's Revise Appellate Procedure in Georgia," see 27 Ga. St. B.J. 135 (1991).

JUDICIAL DECISIONS

ANALYSIS

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CONTENT OF TRANSCRIPT

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General Consideration

One purpose of requirement of filing transcript under subsections (a) and (e) is to afford local counsel in county where case was tried convenient access to exact duplicate copy of record so as to enable him to easily ascertain proper references to be included in his brief and written argument. *Law v. Smith*, 226 Ga. 298, 174 S.E.2d 893 (1970).

Section provides means of obtaining brief of evidence where not recorded at trial. — Where evidence was not reported, the only way of obtaining brief of evidence upon which court may consider whether there should be grant of new trial is provided by this section and if judge is unable to remember evidence he shall enter order to that effect. *Hill v. General Rediscout Corp.*, 116 Ga. App. 459, 157 S.E.2d 888 (1967).

Filed transcript constitutes public record. — Once the prepared transcript is filed with the trial court clerk, it becomes a matter of public record to which all members of the public have reasonable access. *Georgia Am. Ins. Co. v. Varnum*, 182 Ga. App. 907, 357 S.E.2d 609 (1987).

Appellant not obligated to prepare record. — The obligation of the appellant relates to the transcript, and the obligation for the preparation of the record rests with the clerk. After the appellant has filed a notice of appeal, his duty as to the record is limited to the payment of costs. Where the clerk fails to transmit the record, but there is no indication that this failure is occasioned by the failure of a party to pay costs, the trial court has no discretion to dismiss the appeal. *Long v. City of Midway*, 251 Ga. 364, 306 S.E.2d 639 (1983).

Right to transcription. — Although trial counsel failed to inform appellant of the right to have the trial and proceedings transcribed, appellant, through his appellate counsel, did not attempt to file a transcript or stipulation of the case pursuant to this section; accordingly, it is presumed that the lack of actual transcription was not prejudicial. *Southerton v. State*, 205 Ga. App. 366,

422 S.E.2d 251 (1992).

Burden on appellant to prepare transcript.

— The burden is on the appellants to prepare a copy of the transcript for inclusion in the appellate record. *Young v. First Am. Bank*, 196 Ga. App. 348, 396 S.E.2d 73 (1990).

It is duty of appellant to have transcript prepared, if it is needed for decision in case. *Graham v. Haley*, 224 Ga. 498, 162 S.E.2d 346 (1968).

Defendant only allowed 45 minutes to employ court reporter. — The trial court did not err in only allowing defendant in forma pauperis 45 minutes in which to employ a court reporter after he appeared at the hearing without one where defendant was provided at least two weeks' notice of the date of the hearing and could have arranged for a court reporter to be present within this time period. *Quaterman v. Weiss*, 212 Ga. App. 563, 442 S.E.2d 813 (1994).

The filing of a pauper's affidavit does not relieve the appellant in a civil action from the responsibility of having the transcript prepared, pursuant to this Code section. *Wright v. Southern Inv. Properties*, 204 Ga. App. 538, 419 S.E.2d 764 (1992).

Appellant must produce transcript from which existence of error may be determined. — Appellant bears burden of showing error below, and where appellant fails to provide transcript from which existence of such error may be determined, appellate court has nothing to review. *Blackshear v. Blackshear*, 232 Ga. 312, 206 S.E.2d 429 (1974), cert. denied, 419 U.S. 968, 95 S. Ct. 232, 42 L. Ed. 2d 184 (1975).

Transcript or stipulation of record prerequisite to consideration of errors. — Absent transcript or stipulation of record, appellate court cannot consider evidentiary errors assigned. *Mays v. Safeway Fin. Co.*, 139 Ga. App. 229, 228 S.E.2d 319 (1976).

Where evidence is not brought before appellate court by any of the methods provided in this section judgment of trial court on evidentiary matters cannot be reviewed. *Burns v. Barnes*, 154 Ga. App. 802, 270 S.E.2d 57 (1980); *Williamson v. Williams*,

156 Ga. App. 154, 274 S.E.2d 136 (1980); *Welch v. Mercer*, 165 Ga. App. 776, 302 S.E.2d 629 (1983); *Blankenship v. Blankenship*, 169 Ga. App. 715, 314 S.E.2d 491 (1984).

Enumeration of errors dependent upon transcript of evidence and proceedings cannot be reviewed by appellate court where it is not reported, there is a dispute between counsel of both parties as to what actually transpired at hearing, and trial court is unable to recall it. *Cowart v. Cowart*, 223 Ga. 487, 156 S.E.2d 94 (1967).

In the absence of a transcript, a record prepared from recollection, or a stipulation of the case, an appellate court cannot consider enumerations of error based on the evidence. *Perry v. City of Hampton*, 200 Ga. App. 329, 409 S.E.2d 92, cert. denied, 200 Ga. App. 897, 409 S.E.2d 92 (1991).

The superior court was required to presume, in the absence of a contrary showing, that the evidence introduced in the municipal court supported the defendant's convictions, because no transcript or summary of the evidence was contained in the record transmitted to it by the municipal court. *Giles v. City of Locust Grove*, 203 Ga. App. 164, 416 S.E.2d 758, cert. denied, 203 Ga. App. 906, 416 S.E.2d 758 (1992).

Where the transcript of the trial has not been filed and transmitted to the Court of Appeals, there is no question presented upon which the Court of Appeals can pass. *Harris v. Clark*, 157 Ga. App. 549, 278 S.E.2d 132 (1981).

Questions regarding proceedings not incorporated in transcript. — Court of Appeals cannot consider questions with respect to proceedings on trial which are merely related in enumeration of errors but are not incorporated in properly authenticated transcript. *Palmer v. Stevens*, 115 Ga. App. 398, 154 S.E.2d 803 (1967); *West v. State*, 120 Ga. App. 390, 170 S.E.2d 698 (1969).

Omission from record on appeal of necessary transcript requires affirmance. — Where transcript is necessary for review and appellant omits it from record on appeal, appellate court must assume judgment below was correct and affirm. *Brown v. Frachiseur*, 247 Ga. 463, 277 S.E.2d 16 (1981).

Where appellant fails to bring up transcript or otherwise meet burden of affirma-

tively showing error by record, judgment below will not be disturbed. *Burns v. Barnes*, 154 Ga. App. 802, 270 S.E.2d 57 (1980); *Welch v. Mercer*, 165 Ga. App. 776, 302 S.E.2d 629 (1983).

It is duty of party asserting error to show it by the record. Assertions of evidence in briefs or enumerations of error cannot satisfy this duty. *York v. Miller*, 168 Ga. App. 849, 310 S.E.2d 577- (1983).

An appeal in which a consideration of the enumeration of errors is dependent upon a consideration of the evidence heard by the trial court will be affirmed if a transcript is not included as a part of the appellant record. The party asserting error has a duty to show it by the record. *McClaskey v. Jiffy Lube, Inc.*, 197 Ga. App. 537, 398 S.E.2d 825 (1990).

Absent transcript, court must assume evidence authorized judgment. — Where there is no transcript of evidence prepared by court reporter, nor transcript prepared from recollection, agreed to by parties, Supreme Court must assume evidence authorized judgment. *Drake v. Drake*, 231 Ga. 193, 200 S.E.2d 719 (1973).

Where no transcript is included in record on appeal, Court of Appeals must assume that evidence was sufficient to support judgment. *Burns v. Barnes*, 154 Ga. App. 802, 270 S.E.2d 57 (1980).

Where the evidence is not brought before the appellate court by transcript or any other method provided in this section, judgment on evidentiary matters cannot be reviewed and the appellate court must assume that the judgment on appeal is correct. *Wright v. Southern Inv. Properties*, 204 Ga. App. 538, 419 S.E.2d 764 (1992).

Absent transcript or stipulation of record as provided in section, appellate court must assume that rulings of trial court judge were correct. *Mays v. Safeway Fin. Co.*, 139 Ga. App. 229, 228 S.E.2d 319 (1976).

Appeal with enumerations of error dependent upon consideration of evidence heard by trial court will, absent transcript, be affirmed. *Russell v. State*, 155 Ga. App. 555, 271 S.E.2d 689 (1980).

In the absence of a transcript it must be assumed as a matter of law that the evidence adduced at the hearing supported the findings of the court. *Smith v. State*, 160 Ga. App. 26, 285 S.E.2d 749 (1981).

General Consideration (Cont'd)

Lacking a transcript of the evidence considered by the trial court, an appellate court must presume that judge correctly ruled on the issues presented. *Attwell v. Heritage Bank Mt. Pleasant*, 161 Ga. App. 193, 291 S.E.2d 28 (1982).

Where there is no transcript (none having been requested) and no agreed statement of the facts is furnished, the appellate court is bound to assume that the trial court's findings are supported by sufficient competent evidence, for there is a presumption in favor of the regularity of all proceedings in a court of competent jurisdiction. *Siegel v. General Parts Corp.*, 165 Ga. App. 339, 301 S.E.2d 292 (1983).

Where appellant brings an appeal contending that the trial court erred in giving one of appellee's requested charges because the evidence did not support such a charge, but no transcript is included as a part of the record on appeal, the appellate court must affirm. *Welch v. Mercer*, 165 Ga. App. 776, 302 S.E.2d 629 (1983).

Whenever the enumerations of error require a review of the evidence and a transcript is not included in the record on appeal, the enumerations must be deemed meritless and the judgment of the trial court affirmed. *Camp v. Jordan*, 168 Ga. App. 339, 309 S.E.2d 384 (1983).

Where judge did not affirmatively state that he did not recall the voir dire proceedings, the absence of such an order was not error, where the error enumerated by defendant is dependent on a transcript of evidence, and no transcript existed. *Shuman v. Strickland Transport-Leasing Co.*, 203 Ga. App. 456, 416 S.E.2d 885 (1992).

Where, on appeal from termination of his parental rights, appellant contends he was denied due process, a fair and impartial hearing, and the opportunity to present his case, and also maintains the trial court was biased, each of appellant's enumerated errors requires review of the hearing transcript or the accepted substitute therefor, and in the absence of a transcript, the appellate court must assume the trial court's findings were supported by evidence presented and the actions taken by the trial court during the hearing were appropriate. *Baugh v. Robinson*, 179 Ga. App. 571, 346 S.E.2d 918 (1986).

There being a presumption in favor of the regularity of proceedings in courts of competent jurisdiction, the Court of Appeals must assume that the trial court's findings are supported by sufficient competent evidence. *Smallwood v. Mulkey*, 198 Ga. App. 496, 402 S.E.2d 99 (1991).

For a civil litigant to present for appellate review a claim of error made during the course of the proceedings at trial, the litigant must include, at the barest minimum, a transcript of that portion of the proceedings in which the alleged error occurred; or, in the alternative, a sufficiently detailed stipulation approved by an appropriate judge of the court in which the proceedings were conducted. *Tadlock v. Duncan*, 215 Ga. App. 441, 451 S.E.2d 80 (1994).

Motion for new trial is part of "proceedings" as contemplated by this section. *Hall v. State*, 162 Ga. App. 713, 293 S.E.2d 862 (1982).

Where local rules of court are not set out in the record on appeal, an appellate court cannot take judicial cognizance of the content of these rules and must, therefore, presume that the trial court properly interpreted and applied its own rules insofar as they affect the judgment appealed from. *Attwell v. Heritage Bank Mt. Pleasant*, 161 Ga. App. 193, 291 S.E.2d 28 (1982).

Document never admitted into evidence not part of appellate record. — A document which was never actually admitted into evidence at trial cannot properly become a part of the record on appeal, but is not reversible error where the document is merely cumulative of competent evidence to the same effect. *Ray v. Standard Fire Ins. Co.*, 168 Ga. App. 116, 308 S.E.2d 221 (1983).

Evidence never actually admitted at trial cannot properly become a part of the record on appeal where this section is solely for the purpose of making the record speak the truth, not for adding evidence to the record or supplying fatal deficiencies after the fact. *Harp v. State*, 204 Ga. App. 527, 420 S.E.2d 6, cert. denied, 204 Ga. App. 921, 420 S.E.2d 6 (1992).

Failure to properly supplement record. — Where a party seeks to have a record on appeal supplemented under this section but does not follow statutory procedures there is nothing for an appellate court to review. *Cox v. Fillingim*, 184 Ga. App. 205, 361 S.E.2d 65 (1987).

Cited in American Int'l Indus., Inc. v. Ivan Allen Co., 110 Ga. App. 148, 138 S.E.2d 61 (1964); McCranie v. Mullis, 221 Ga. 617, 146 S.E.2d 723 (1966); Webb v. Jones, 221 Ga. 754, 146 S.E.2d 910 (1966); Salisbury v. State, 222 Ga. 549, 150 S.E.2d 819 (1966); Holloway v. Poppell, 114 Ga. App. 531, 152 S.E.2d 4 (1966); Ledbetter v. State, 116 Ga. App. 276, 157 S.E.2d 40 (1967); Hair v. Chilton, 223 Ga. 632, 157 S.E.2d 290 (1967); Wilbanks v. State, 116 Ga. App. 698, 158 S.E.2d 274 (1967); Delta Corp. of Am. v. Aiken, 224 Ga. 241, 161 S.E.2d 293 (1968); Herring v. R.L. Mathis Certified Dairy Co., 118 Ga. App. 132, 162 S.E.2d 863 (1968); Leiter v. Arnold, 118 Ga. App. 108, 163 S.E.2d 235 (1968); Price v. State, 118 Ga. App. 207, 163 S.E.2d 243 (1968); Smith v. Smith, 224 Ga. 689, 164 S.E.2d 225 (1968); Greene v. McIntyre, 119 Ga. App. 296, 167 S.E.2d 203 (1969); Stephens v. State, 119 Ga. App. 674, 168 S.E.2d 333 (1969); Cohran v. Sosebee, 120 Ga. App. 115, 169 S.E.2d 624 (1969); O'Quinn v. State, 121 Ga. App. 231, 173 S.E.2d 409 (1970); Richardson v. Nu-Way Cleaners & Laundry, 121 Ga. App. 425, 174 S.E.2d 202 (1970); McKinney v. State, 121 Ga. App. 815, 175 S.E.2d 893 (1970); Duncan v. Duncan, 226 Ga. 605, 176 S.E.2d 88 (1970); Bridges v. State, 227 Ga. 24, 178 S.E.2d 861 (1970); O'Gorman v. O'Gorman, 227 Ga. 468, 181 S.E.2d 490 (1971); Wisenbaker v. Wisenbaker, 227 Ga. 610, 182 S.E.2d 114 (1971); Miller v. Sparks, 124 Ga. App. 4, 183 S.E.2d 88 (1971); Taylor v. Taylor, 228 Ga. 173, 184 S.E.2d 471 (1971); Ellison v. Labor Pool of Am., Inc., 228 Ga. 147, 184 S.E.2d 572 (1971); Lamb Bros. v. Industrial Credit Co., 228 Ga. 213, 184 S.E.2d 585 (1971); Herring v. Herring, 228 Ga. 492, 186 S.E.2d 538 (1971); Heard v. State, 126 Ga. App. 62, 189 S.E.2d 895 (1972); Penland v. State, 229 Ga. 256, 190 S.E.2d 900 (1972); United States Fid. & Guar. Co. v. Georgia Farm Bureau Mut. Ins. Co., 126 Ga. App. 831, 191 S.E.2d 893 (1972); Dalton v. State, 127 Ga. App. 504, 194 S.E.2d 268 (1972); Cagle v. Atchley, 127 Ga. App. 668, 194 S.E.2d 598 (1972); Huckaby v. State, 128 Ga. App. 79, 195 S.E.2d 688 (1973); Johnson v. State, 230 Ga. 196, 196 S.E.2d 385 (1973); Morris v. Jones, 128 Ga. App. 847, 198 S.E.2d 354 (1973); Allen v. State, 230 Ga. 772, 199 S.E.2d 246 (1973); MacNerland v. Barnes, 129 Ga. App.

367, 199 S.E.2d 564 (1973); Jenkins v. Jenkins, 231 Ga. 371, 202 S.E.2d 52 (1973); Jackson v. State, 130 Ga. App. 581, 203 S.E.2d 923 (1974); Nicholson v. Nicholson, 231 Ga. 760, 204 S.E.2d 292 (1974); Ayers Enters., Ltd. v. Adams, 131 Ga. App. 12, 205 S.E.2d 16 (1974); Maddox v. State, 131 Ga. App. 86, 205 S.E.2d 31 (1974); Castile v. Rich's, Inc., 131 Ga. App. 586, 206 S.E.2d 851 (1974); Darsey v. Darsey, 232 Ga. 381, 207 S.E.2d 22 (1974); Umstead v. State, 131 Ga. App. 833, 207 S.E.2d 238 (1974); Banks v. State, 132 Ga. App. 809, 209 S.E.2d 252 (1974); Brand v. Montega Corp., 233 Ga. 35, 209 S.E.2d 583 (1974); Brown v. State, 133 Ga. App. 56, 209 S.E.2d 721 (1974); Freedle v. Galloway, 133 Ga. App. 424, 211 S.E.2d 29 (1974); Mullins v. State, 133 Ga. App. 554, 211 S.E.2d 631 (1974); Parrott v. State, 133 Ga. App. 931, 213 S.E.2d 77 (1975); Patterson v. State, 233 Ga. 724, 213 S.E.2d 612 (1975); Coop Mtg. Invs. Assocs. v. Pendley, 134 Ga. App. 236, 214 S.E.2d 572 (1975); Bouldin v. Baum, 134 Ga. App. 484, 214 S.E.2d 734 (1975); Millcreek Properties, Inc. v. Gregory, 136 Ga. App. 511, 221 S.E.2d 685 (1975); Gillen v. Bostick, 234 Ga. 308, 215 S.E.2d 676 (1975); Savage v. Savage, 234 Ga. 853, 218 S.E.2d 568 (1975); Diamond v. Chatham County Bd. of Tax Assessors, 135 Ga. App. 645, 218 S.E.2d 657 (1975); Anderson v. Anderson, 235 Ga. 115, 218 S.E.2d 846 (1975); Tucker v. State, 136 Ga. App. 456, 221 S.E.2d 664 (1975); Smith v. State, 235 Ga. 852, 221 S.E.2d 601 (1976); Tele-Spot v. Garden Cities Corp., 137 Ga. App. 238, 223 S.E.2d 273 (1976); Cowart v. Cowart, 236 Ga. 626, 225 S.E.2d 5 (1976); McGregor v. Town of Fort Oglethorpe, 236 Ga. 711, 225 S.E.2d 238 (1976); Daughtrey v. State, 138 Ga. App. 504, 226 S.E.2d 773 (1976); Stanley v. Stanley, 138 Ga. App. 560, 226 S.E.2d 800 (1976); Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976); Street v. State, 237 Ga. 307, 227 S.E.2d 750 (1976); Copeland v. State, 139 Ga. App. 55, 227 S.E.2d 850 (1976); Patterson v. Professional Resources, Inc., 140 Ga. App. 315, 231 S.E.2d 88 (1976); Wyche v. State, 140 Ga. App. 341, 231 S.E.2d 122 (1976); Walsey v. Lockhart, 140 Ga. App. 348, 231 S.E.2d 124 (1976); McClure v. DOT, 140 Ga. App. 564, 231 S.E.2d 532 (1976); Chaplin v. State, 141 Ga. App. 788, 234 S.E.2d 330 (1977); Orr v. Woodruff-Robinson, Inc., 142 Ga. App. 861, 237 S.E.2d

General Consideration (Cont'd)

- 463 (1977); *Hunter v. State*, 143 Ga. App. 541, 239 S.E.2d 212 (1977); *Seymour v. State*, 144 Ga. App. 32, 240 S.E.2d 305 (1977); *Blue v. State*, 144 Ga. App. 378, 241 S.E.2d 36 (1977); *Whitehead v. Great Cent. Ins. Co.*, 144 Ga. App. 422, 241 S.E.2d 302 (1977); *Burnett v. Doster*, 144 Ga. App. 443, 241 S.E.2d 319 (1978); *Adderholt v. Adderholt*, 240 Ga. 626, 242 S.E.2d 11 (1978); *Parker v. State*, 145 Ga. App. 205, 243 S.E.2d 580 (1978); *Lee v. Southeastern Plumbing Supply Co.*, 145 Ga. App. 465, 244 S.E.2d 33 (1978); *Dozier v. Norris*, 241 Ga. 230, 244 S.E.2d 853 (1978); *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978); *Smart v. State*, 147 Ga. App. 117, 248 S.E.2d 185 (1978); *Lake v. Hicks*, 147 Ga. App. 175, 248 S.E.2d 236 (1978); *Cousins Mtg. & Equity v. Hamilton*, 147 Ga. App. 210, 248 S.E.2d 516 (1978); *Haga v. Holcombe*, 147 Ga. App. 520, 249 S.E.2d 695 (1978); *Ewing v. State*, 147 Ga. App. 546, 249 S.E.2d 696 (1978); *Montford v. State*, 148 Ga. App. 335, 251 S.E.2d 125 (1978); *Williamson v. Alderman*, 148 Ga. App. 297, 251 S.E.2d 153 (1978); *Bowen v. State*, 151 Ga. App. 166, 259 S.E.2d 169 (1979); *Moore v. State*, 151 Ga. App. 413, 260 S.E.2d 350 (1979); *Thomas v. State*, 151 Ga. App. 562, 260 S.E.2d 556 (1979); *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979); *McIntyre v. Gulf Oil Corp.*, 151 Ga. App. 855, 261 S.E.2d 766 (1979); *Smith v. State Farm Mut. Auto. Ins. Co.*, 152 Ga. App. 825, 264 S.E.2d 296 (1979); *Ross v. State*, 245 Ga. 173, 263 S.E.2d 913 (1980); *Hart v. State*, 153 Ga. App. 53, 264 S.E.2d 542 (1980); *Walker v. State*, 153 Ga. App. 89, 264 S.E.2d 565 (1980); *Duke v. State*, 153 Ga. App. 129, 265 S.E.2d 73 (1980); *Walker v. State*, 153 Ga. App. 831, 266 S.E.2d 580 (1980); *Rutledge v. State*, 245 Ga. 768, 267 S.E.2d 199 (1980); *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316 (1980); *Taurus Prods., Inc. v. Maryland Sound Indus., Inc.*, 155 Ga. App. 147, 270 S.E.2d 337 (1980); *State v. Graham*, 246 Ga. 341, 271 S.E.2d 627 (1980); *Rogers v. State*, 155 Ga. App. 685, 272 S.E.2d 549 (1980); *McCroy v. State*, 155 Ga. App. 777, 272 S.E.2d 747 (1980); *Bohin v. State*, 156 Ga. App. 206, 274 S.E.2d 592 (1980); *Hanna Creative Enters., Inc. v. Alterman Foods, Inc.*, 156 Ga. App. 376, 274 S.E.2d 761 (1980); *Strickland v. Boswell*, 156 Ga. App. 375, 274 S.E.2d 769 (1980); *Whisenhunt v. State*, 156 Ga. App. 583, 275 S.E.2d 82 (1980); *Graham v. State*, 156 Ga. App. 538, 275 S.E.2d 114 (1980); *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980); *American Vigorelli, Inc. v. Smith, Phillips & Di Pietro*, 157 Ga. App. 52, 276 S.E.2d 158 (1981); *Bhatia v. West Cash & Carry Bldg. Materials of Savannah, Inc.*, 157 Ga. App. 145, 276 S.E.2d 656 (1981); *Cole v. Jordan*, 158 Ga. App. 200, 279 S.E.2d 497 (1981); *Harkey v. State*, 159 Ga. App. 112, 282 S.E.2d 648 (1981); *McRae v. Smith*, 159 Ga. App. 19, 282 S.E.2d 676 (1981); *Foster v. Waverly Hall United Dev. Corp.*, 159 Ga. App. 710, 285 S.E.2d 35 (1981); *Edwards v. Davis*, 160 Ga. App. 122, 286 S.E.2d 301 (1981); *Montgomery v. Tremblay*, 249 Ga. 483, 292 S.E.2d 64 (1982); *Godfrey v. Kirk*, 161 Ga. App. 474, 288 S.E.2d 301 (1982); *Neal v. State*, 161 Ga. App. 77, 289 S.E.2d 293 (1982); *Sams v. State*, 162 Ga. App. 118, 290 S.E.2d 321 (1982); *Brewer v. State*, 162 Ga. App. 228, 291 S.E.2d 87 (1982); *Cameron v. Cox*, 162 Ga. App. 268, 291 S.E.2d 115 (1982); *Walker v. State*, 163 Ga. App. 684, 294 S.E.2d 717 (1982); *Freeman v. Gold & White, Inc.*, 163 Ga. App. 467, 294 S.E.2d 718 (1982); *Brannon v. State*, 163 Ga. App. 340, 295 S.E.2d 110 (1982); *Cooper v. State*, 163 Ga. App. 482, 295 S.E.2d 161 (1982); *McKenney v. State*, 163 Ga. App. 545, 295 S.E.2d 217 (1982); *Gray v. Loper*, 163 Ga. App. 552, 295 S.E.2d 229 (1982); *Burleson v. Jordan*, 163 Ga. App. 496, 295 S.E.2d 335 (1982); *Readd v. State*, 164 Ga. App. 97, 296 S.E.2d 402 (1982); *Gilbert v. Colonial Stores Div.*, 164 Ga. App. 100, 296 S.E.2d 404 (1982); *Scott v. Leder*, 164 Ga. App. 334, 297 S.E.2d 103 (1982); *Snider v. Lavender*, 164 Ga. App. 591, 298 S.E.2d 582 (1982); *Hutting Sash & Door Co. v. Controlled Bldg. Corp.*, 165 Ga. App. 99, 299 S.E.2d 411 (1983); *High v. Zant*, 250 Ga. 693, 300 S.E.2d 654 (1983); *Roper v. State*, 251 Ga. 95, 303 S.E.2d 103 (1983); *In re T.E.D.*, 166 Ga. App. 322, 303 S.E.2d 777 (1983); *In re S.D.S.*, 166 Ga. App. 344, 304 S.E.2d 85 (1983); *Smith v. State*, 251 Ga. 229, 304 S.E.2d 716 (1983); *Edelberg v. Porterfield*, 166 Ga. App. 383, 304 S.E.2d 739 (1983); *Bray v. Carlyle*, 167 Ga. App. 208, 306 S.E.2d 89 (1983); *In re G.W.H.*, 168 Ga. App. 845, 310 S.E.2d 573 (1983); *O'Neal v. State*, 168 Ga. App. 869, 310 S.E.2d 751 (1983); *Hill Aircraft & Leas-*

ing Corp. v. Planes, Inc., 169 Ga. App. 161, 312 S.E.2d 119 (1983); Thigpen v. Johnson, 169 Ga. App. 410, 313 S.E.2d 121 (1984); Branton v. Stone, 169 Ga. App. 737, 315 S.E.2d 24 (1984); Rosemond v. Prudential Property & Cas. Ins. Co., 170 Ga. App. 189, 316 S.E.2d 541 (1984); Global Assocs. v. Pan Am. Telecommunications, Inc., 170 Ga. App. 116, 316 S.E.2d 562 (1984); Butler v. State, 170 Ga. App. 257, 316 S.E.2d 841 (1984); Trammell v. F & M Bank, 170 Ga. App. 347, 317 S.E.2d 323 (1984); Gaye v. State, 170 Ga. App. 357, 317 S.E.2d 334 (1984); Watts v. State, 170 Ga. App. 614, 317 S.E.2d 654 (1984); New v. State, 171 Ga. App. 392, 319 S.E.2d 542 (1984); Chambers v. DOT, 172 Ga. App. 197, 322 S.E.2d 366 (1984); Davis v. State, 172 Ga. App. 710, 324 S.E.2d 559 (1984); Taylor v. State, 172 Ga. App. 827, 324 S.E.2d 788 (1984); Williams v. State, 173 Ga. App. 207, 325 S.E.2d 783 (1984); Vaughn v. State, 173 Ga. App. 716, 327 S.E.2d 747 (1985); Green v. Gaydon, 174 Ga. App. 796, 331 S.E.2d 106 (1985); Uren v. State, 174 Ga. App. 804, 331 S.E.2d 642 (1985); Bruce v. State, 175 Ga. App. 453, 333 S.E.2d 394 (1985); Dugger v. Danello, 175 Ga. App. 618, 334 S.E.2d 3 (1985); Kloszewski v. State, 177 Ga. App. 153, 338 S.E.2d 741 (1985); State v. Mitchell, 177 Ga. App. 333, 339 S.E.2d 384 (1985); Milford v. State, 178 Ga. App. 792, 344 S.E.2d 505 (1986); Campbell v. State, 181 Ga. App. 1, 351 S.E.2d 209 (1986); Smith v. State, 182 Ga. App. 58, 354 S.E.2d 681 (1987); Decatur Hous. Auth. v. Christian, 182 Ga. App. 270, 355 S.E.2d 764 (1987); Robinson v. State, 182 Ga. App. 423, 356 S.E.2d 55 (1987); Gentile v. Miller, Stevenson & Steinichen, Inc., 182 Ga. App. 690, 356 S.E.2d 666 (1987); Miller v. State, 183 Ga. App. 563, 359 S.E.2d 359 (1987); Wagner v. Howell, 257 Ga. 801, 363 S.E.2d 759 (1988); Mapp v. State, 258 Ga. 273, 368 S.E.2d 511 (1988); Jones v. State, 185 Ga. App. 595, 365 S.E.2d 153 (1988); In re C.C.B., 188 Ga. App. 46, 372 S.E.2d 6 (1988); Dean v. State, 188 Ga. App. 128, 372 S.E.2d 286 (1988); Whiteley v. State, 188 Ga. App. 129, 372 S.E.2d 296 (1988); In re Holly, 188 Ga. App. 202, 372 S.E.2d 479 (1988); Richmond Leasing Co. v. First Union Bank, 188 Ga. App. 843, 374 S.E.2d 746 (1988); Hunt v. Lee, 190 Ga. App. 403, 379 S.E.2d 215 (1989); Hout v. State, 190 Ga. App. 700, 380 S.E.2d 330 (1989); Brown v. Thomas, 191

Ga. App. 679, 382 S.E.2d 656 (1989); Coffee v. Silver, 195 Ga. App. 247, 393 S.E.2d 58 (1990); National Sur. Corp. v. O'Dell, 195 Ga. App. 374, 393 S.E.2d 504 (1990); Sizemore v. State, 195 Ga. App. 548, 395 S.E.2d 669 (1990); Odom v. State, 196 Ga. App. 293, 396 S.E.2d 27 (1990); Burns v. State, 196 Ga. App. 732, 397 S.E.2d 19 (1990); Thrasher v. State, 197 Ga. App. 593, 398 S.E.2d 850 (1990); Hamm v. Willis, 201 Ga. App. 723, 411 S.E.2d 771 (1991); Dover v. Master Lease Corp., 203 Ga. App. 526, 417 S.E.2d 368 (1992); Walls v. State, 204 Ga. App. 348, 419 S.E.2d 344 (1992); Robbins v. State, 207 Ga. App. 556, 428 S.E.2d 450 (1993); Walton v. State, 207 Ga. App. 787, 429 S.E.2d 158 (1993); Woods v. State, 208 Ga. App. 565, 431 S.E.2d 167 (1993); State v. Cobb, 208 Ga. App. 752, 432 S.E.2d 112 (1993); Alcovy Properties, Inc. v. MTW Inv. Co., 212 Ga. App. 102, 441 S.E.2d 288 (1994); Johnson v. Hardwick, 212 Ga. App. 44, 441 S.E.2d 450 (1994); Leavitt v. State, 264 Ga. 178, 442 S.E.2d 457 (1994); Asbury v. Georgia World Congress Ctr., 212 Ga. App. 628, 442 S.E.2d 822 (1994); Smith v. State, 213 Ga. App. 536, 445 S.E.2d 341 (1994); Effel v. Effel, 213 Ga. App. 623, 445 S.E.2d 373 (1994).

Constitutionality

Subsection (g) and (i) do not deny due process. — Provisions of subsections (g) and (i), relating to preparation of transcript of proceedings from recollection or by stipulation, do not deny due process of law. *Wall v. Citizens & S. Bank*, 247 Ga. 216, 274 S.E.2d 486 (1981).

Method of perfecting record under subsection (g) is not so inadequate as to deny meaningful appeal. *Hunt v. State*, 133 Ga. App. 548, 211 S.E.2d 601 (1974).

Standing to challenge. — A defendant who did not request that a transcript be made did not have standing to challenge the constitutionality of this section by alleging that this section denied him equal protection of the law in that only a defendant who can afford to have his misdemeanor trial proceedings transcribed has a right to a transcript under subsection (j), while an indigent defendant may have his misdemeanor trial proceedings transcribed only at the discretion of the trial court. *Williams v. State*, 254 Ga. 690, 333 S.E.2d 613 (1985).

Judicial Discretion

Reference in subsection (b) to discretion concerns terms judge may require for reporting and transcribing, but not to a party's mandatory right to have proceedings reported at own expense. *Dumas v. State*, 131 Ga. App. 79, 205 S.E.2d 119 (1974).

Provisions of subsection (c) are merely discretionary and not mandatory, and trial judge is not obligated to have case reported. *Liberty Loan & Thrift Corp. v. Meeks*, 115 Ga. App. 846, 156 S.E.2d 172 (1967); *Gunter v. National City Bank*, 239 Ga. 496, 238 S.E.2d 48 (1977).

Discretion granted the trial court by subsection (f) vests it with a necessary control over the designation and transmittal of both record and transcript. *Washburn v. Sardi's Restaurants*, 191 Ga. App. 307, 381 S.E.2d 750, cert. denied, 191 Ga. App. 923, 381 S.E.2d 750 (1989).

Where a criminal defendant contended that the prosecutor's affidavit conflicted with the affidavits of the defendant's trial counsel, the trial court's adoption of the prosecutor's affidavit was dispositive, and was not subject to review. *Smith v. State*, 260 Ga. 274, 393 S.E.2d 229 (1990).

Recording of evidence at interlocutory hearing or subsequent contempt hearing. — It is not incumbent upon trial judge to arrange for official reporter to take down evidence at interlocutory hearing or subsequent contempt hearing; the law does not mandate that every civil case be reported. *Savage v. Savage*, 234 Ga. 853, 218 S.E.2d 568 (1975).

Felony Cases

State must have transcript of evidence prepared in all felony cases. — Under § 17-8-5 and subsection (a) of this section, it is the duty of the state in all felony cases to have transcript of evidence and proceedings reported and prepared and, after guilty verdict has been returned, to file transcript. *Parrott v. State*, 134 Ga. App. 160, 214 S.E.2d 3 (1975), overruled on other grounds, *Mathis v. State*, 147 Ga. App. 148, 248 S.E.2d 212 (1978).

State function to prepare transcript. — It is not the function of courts to prepare transcript of criminal trial; that is the function of the state, as required by subsection

(a). *Knowles v. State*, 156 Ga. App. 389, 274 S.E.2d 590 (1980), rev'd on other grounds, 247 Ga. 218, 274 S.E.2d 468 (1981).

All testimony and proceedings except argument of counsel must be reported. *Aiken v. State*, 226 Ga. 840, 178 S.E.2d 202 (1970), cert. denied, 401 U.S. 982, 91 S. Ct. 1216, 28 L. Ed. 2d 334 (1971).

Construing this section with § 17-8-5, it would appear that in a felony case all testimony and proceedings must be reported, except argument of counsel. *Graham v. State*, 153 Ga. App. 658, 266 S.E.2d 316, rev'd on other grounds, 246 Ga. 341, 271 S.E.2d 627 (1980).

Where objection made to argument of state's counsel, upon motion of accused, transcript shall include argument. Where objection is made to argument of state's counsel, and upon motion of accused, court shall require that transcript of argument be made. *Aiken v. State*, 226 Ga. 840, 178 S.E.2d 202 (1970), cert. denied, 401 U.S. 982, 91 S. Ct. 1216, 28 L. Ed. 2d 334 (1971).

Where trial transcript is not available to appellant, he is effectively denied his right to appeal. *Wade v. State*, 231 Ga. 131, 200 S.E.2d 271 (1973).

State's failure to file correct transcript. — Where court reporter worked over 100 hours and was unable to decipher inaudible tapes, and trial court and counsel were unable to reconstruct record, failure of state to file correct transcript, through no fault of appellant, effectively deprives defendant of his right of appeal. *Knowles v. State*, 156 Ga. App. 389, 274 S.E.2d 590 (1980), rev'd on other grounds, 247 Ga. 218, 274 S.E.2d 468 (1981).

Failure of state to file transcript, or correct transcript, even where caused, as here, by its inability to file it (and not by appellant's fault), effectively denies appellant his right to appeal because a complete and correct transcript of his trial is not available to him. *Parrott v. State*, 134 Ga. App. 160, 214 S.E.2d 3 (1975).

Misdemeanor Cases

The provisions of subsection (b) are not mandatory and the trial court is not obligated to have a misdemeanor trial case reported. *Frasier v. State*, 160 Ga. App. 812, 287 S.E.2d 669 (1982).

Whether transcript shall be prepared in misdemeanor case initially lies within discretion of trial court. *Williams v. State*, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

It lies within the discretion of the trial court to grant or deny an indigent the transcription of the trial of a misdemeanor. *Hughes v. State*, 168 Ga. App. 413, 309 S.E.2d 409 (1983).

In misdemeanor cases, it is discretionary with the trial court as to whether the proceedings are transcribed. Thus, absent a demand for a transcript, prepared at the request of the demanding party, the reporting of such a case is not required as a matter of law. *Ward v. State*, 188 Ga. App. 372, 373 S.E.2d 65 (1988).

Reporting of misdemeanor not required absent demand by party willing to bear expense of preparation. *Williams v. State*, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

Indigent defendant charged with misdemeanor may request transcription. — Where trial court, sua sponte, has not ordered such, indigent defendant, on trial on misdemeanor charge, must make request or motion to trial court that evidence and proceedings be reported and transcribed. *Parker v. State*, 154 Ga. App. 668, 269 S.E.2d 518 (1980).

Defendant in misdemeanor case is not denied transcript absent demand. — Absent demand by defendant in misdemeanor case for preparation of transcript at own expense under subsection (j), he has not been denied a transcript of his misdemeanor conviction. *Williams v. State*, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

Judge may assign cost of transcript to defendant making request. — Determination that defendant should pay cost of reporting in misdemeanor cases where defense counsel requests proceedings to be recorded is within sound discretion of trial judge to prescribe terms by which misdemeanor cases are to be reported under subsection (b). *Godwin v. State*, 138 Ga. App. 131, 225 S.E.2d 723 (1976).

Court must make sure reporter is available. — When defendant in misdemeanor case asks that case be recorded at his expense, court must make sure that court reporter is available to comply with request. *Thompson v. State*, 240 Ga. 296, 240 S.E.2d 87 (1977).

Defendant in misdemeanor case need not make advance arrangements for court reporter if he desires that trial be recorded. *Thompson v. State*, 240 Ga. 296, 240 S.E.2d 87 (1977).

Defendant need not ensure prior to trial that reporter is in attendance. — Subsection (j) of this section and § 15-14-3 do not put a duty upon a defendant who is charged with a misdemeanor to ensure prior to trial that the court reporter is complying with his statutory duty to attend court sessions. When a defendant is facing a potential criminal conviction with possible resulting fine or imprisonment, such a duty cannot be read into these statutes. *Thompson v. State*, 240 Ga. 296, 240 S.E.2d 87 (1977).

Absence of transcript of hearing in misdemeanor case is attributable to complaining party. *Williams v. State*, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

Hearing on misdemeanor charge. — A defendant must request that a hearing on a misdemeanor charge be reported and transcribed, unless the trial court on its own motion orders that this be done. *Gilbert v. City of Manchester*, 204 Ga. App. 422, 419 S.E.2d 487, cert. denied, 204 Ga. App. 921, 419 S.E.2d 487 (1992).

Absence of transcript on appeal in misdemeanor case requires judgment below be affirmed. *Williams v. State*, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

Reporting of Voir Dire

Defendant in felony case is entitled to have voir dire reported or transcribed and is harmed by failure to do so. *Graham v. State*, 153 Ga. App. 658, 266 S.E.2d 316 (1980).

Must be reported under subsection (d). — Any objection or motion in course of voir dire and court's ruling thereon must be reported under subsection (d), as once ruling of court is made, it would be a matter which may be raised on appeal. *State v. Graham*, 246 Ga. 341, 271 S.E.2d 627 (1980); *Conley v. State*, 157 Ga. App. 166, 276 S.E.2d 677 (1981).

Voir dire examination regarding jurors' feelings about death penalty. — Failure to record voir dire examination of prospective jurors as to their feelings about imposing death penalty in case in which sentence of death is imposed, is reversible error. *Owens v. State*, 233 Ga. 869, 214 S.E.2d 173 (1975).

Reporting of Voir Dire (Cont'd)

The entire voir dire is not required to be reported in all felony cases. *Meier v. State*, 190 Ga. App. 625, 379 S.E.2d 588 (1989).

Where defendant did not cite any specific objection made during voir dire or claim any specific harm from the lack of transcription, an omission could not be reversible error. *Meier v. State*, 190 Ga. App. 625, 379 S.E.2d 588 (1989).

Content of Transcript

Differences from required content of transcript under prior law. — Under old law, transcript on appeal contained only evidence and did not contain any objections, colloquies and various rulings of court on matters arising during trial. The Appellate Practice Act changed this procedure to require that record be made of objections and rulings of court which may be raised on appeal. *State v. Graham*, 246 Ga. 341, 271 S.E.2d 627 (1980).

Inclusion in transcript of all proceedings which may be questioned on appeal. — Subsection (d) contemplates that all proceedings on trial which may be called in question on appeal (including all colloquies, arguments to jury, objections and rulings of court) shall be included in written transcript of proceedings in trial court. *Palmer v. Stevens*, 115 Ga. App. 398, 154 S.E.2d 803 (1967).

Issues raised in brief but not incorporated in transcript. — Court of Appeals cannot consider questions with respect to proceedings on trial which are related in party's brief but are not incorporated in properly authenticated transcript as required by section. *R. & S. Mgt. Co. v. Huntley*, 119 Ga. App. 712, 168 S.E.2d 626 (1969).

Where appellant failed to submit a proposed transcript to the trial judge for approval, and instead, sought to delegate the entire preparation of the transcript to the trial court, the trial court correctly denied appellant's motion asking the court to reconstruct the transcript as the duty does not lie with the court in this respect. *Machiz v. Machiz*, 169 Ga. App. 91, 311 S.E.2d 538 (1983).

Incorrect or Incomplete Transcripts

Purpose of subsection (f). — Subsection (f) is solely for the purpose of making the

record speak the truth, not for adding evidence to the record or supplying fatal deficiencies after the fact. *Wigley v. State*, 194 Ga. App. 7, 389 S.E.2d 769 (1989).

Official or adequately reconstructed transcript required. — Without access either to an official transcript or an adequately reconstructed transcript, a court cannot effect a proper disposition of the issues raised on appeal. *Effel v. Effel*, 207 Ga. App. 809, 428 S.E.2d 809 (1993).

Where transcript or record is incomplete, burden is on complaining party to have record completed in trial court, and when this is not done, there is nothing for appellate court to review. *Zachary v. State*, 245 Ga. 2, 262 S.E.2d 779 (1980); *Smith v. State*, 160 Ga. App. 26, 285 S.E.2d 749 (1981); *Howe v. State*, 250 Ga. 811, 301 S.E.2d 280 (1983); *Ivory v. State*, 199 Ga. App. 283, 405 S.E.2d 90, cert. denied, 199 Ga. App. 906, 405 S.E.2d 90 (1991).

Burden is on complaining party to have record and transcript completed in trial court. *State v. Everett*, 155 Ga. App. 162, 270 S.E.2d 345 (1980).

Where the transcript or record does not fully disclose what transpired at trial, the burden is on the complaining party to have the record completed in the trial court under the provisions of this section. *Page v. State*, 159 Ga. App. 344, 283 S.E.2d 310 (1981).

Where the defendant's opening statement was not recorded and he admits his objection to the trial court's alleged limitation of his statement was not perfected, there is nothing for the Court of Appeals to review on appeal. The complaining party bears the burden of having the record completed in the court below. *Williams v. State*, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

Where there is nothing in the record or transcript to support defendant's contention that a prior ruling of the trial court relieved him of the duty of making a written request to charge on a lesser included offense in order to preserve the issue on appeal, there is nothing for the appellate court to review. *Howe v. State*, 250 Ga. 811, 301 S.E.2d 280 (1983).

Where the transcript or record does not fully disclose what transpired at trial, the burden is on the complaining party to have the record completed in the trial court

under the provisions of this section. When this is not done, there is nothing for the appellate court to review. *Campbell v. Crumpton*, 173 Ga. App. 488, 326 S.E.2d 845 (1985).

Where defendant pled guilty to charges of driving with a suspended driver's license, possession of marijuana, giving a false name to a police officer, failing to maintain no-fault insurance, and displaying an improper license plate, for which the trial court sentenced him to 12 months in prison, four months to be served, and fined him \$1,930, and defendant filed a timely appeal from the trial court's judgment on his plea alleging that the trial court erred by accepting his plea and entering judgment thereon because the guilty plea was not an informed, knowledgeable, and voluntary decision and he was not aware of the relevant circumstances and likely consequences of his decision, the entire record, as designated by defendant to be included on appeal, fails to show that defendant was cognizant of all the rights he was waiving and the possible consequences of his plea, and since the State failed to take any action to correct the alleged omission or to fill a silent record by use of extrinsic evidence affirmatively showing the guilty plea was knowing and voluntary, the state failed to carry its burden, and the trial court erred by accepting defendant's plea and entering judgment thereon. *Agerton v. State*, 191 Ga. App. 633, 382 S.E.2d 417 (1989).

The burden is on the complaining party to have the record completed in the trial court in accordance with provisions of subsection (f). *Massengale v. Moore*, 194 Ga. App. 328, 390 S.E.2d 439 (1990).

Where the transcript or record does not fully disclose what transpired at trial, the burden is on the complaining party to have the record completed in the trial court under the provisions of this section and where there was no amendment or supplement to the record to reflect the necessary facts pursuant to subsection (f) or (g) and since there was no stipulation in the record as to facts pursuant to subsection (i), defendant did not carry the burden to show by the record the facts necessary to prove a claim of racial discrimination. *Thomas v. State*, 208 Ga. App. 367, 430 S.E.2d 768 (1993).

The court of appeals was barred from

considering a letter allegedly constituting a request for a hearing on a summary judgment motion, as the letter, which was attached to the appellate brief, was not part of the record and, thus, was not properly before the court. *Thomas v. Schouten*, 210 Ga. App. 244, 435 S.E.2d 746 (1993).

Evidence never actually admitted at trial cannot properly become part of the record on appeal pursuant to subsection (f). *Nixon v. Rosenthal*, 214 Ga. App. 446, 448 S.E.2d 45 (1994).

Where issue raised can be resolved without resort to omitted portion. — When issue raised in omitted portions of transcript can be resolved by looking to remaining portions of transcript, it cannot be said that anything material to appellant has been omitted from record on appeal. *Zachary v. State*, 245 Ga. 2, 262 S.E.2d 779 (1980).

Trial court has necessary control over designation and transmittal of both record and transcript. *Smith v. Top Dollar Stores, Inc.*, 129 Ga. App. 60, 198 S.E.2d 690 (1973).

Subsection (f) allows trial court to retain some control over record on appeal in certain instances, such as where, in his opinion, appellate court could not properly understand or pass on his rulings unless it had before it material omitted from appeal in first instance but deemed necessary to a decision on points of error raised by litigants. *G.E.C. Corp. v. Southern Fabricators, Inc.*, 122 Ga. App. 452, 177 S.E.2d 497 (1970).

Remedy in trial court. — When the transcript or record does not truly or fully disclose what transpired in the trial court and the parties are unable to agree thereon, the defendant's remedy is in the trial court, not the appellate court. *Epps v. State*, 168 Ga. App. 79, 308 S.E.2d 234 (1983).

Factual and legal findings included in record at trial judge's direction. — Where trial judge directs that clerk include findings of fact and conclusions of law in its correction of record, appellate court may properly consider such corrections made by trial court. *Bradley v. Bradley*, 233 Ga. 83, 210 S.E.2d 1 (1974).

Transcript omitting charge. — In civil case where appellant has not shown that exceptions were made to charge, appellant did not seek hearing in trial court to attempt to show that exceptions to charge were timely made,

Incorrect or Incomplete Transcripts (Cont'd)

and all that is missing in transcript is charge of court and exceptions made thereto, judgment will not be reversed because of deficiencies in transcript. *Albea v. Jackson*, 236 Ga. 690, 225 S.E.2d 46 (1976).

Affidavit of party's counsel does not meet requirements of section regarding correcting record for appeal. *Henderson v. Lewis*, 128 Ga. App. 28, 195 S.E.2d 289 (1973).

One-paragraph statement in affidavit form by the prosecuting attorney was an insufficient substitute for a transcript or recording of an alleged in camera conference during trial. *McGraw v. State*, 199 Ga. App. 389, 405 S.E.2d 53, cert. denied, 199 Ga. App. 906, 405 S.E.2d 53 (1991).

Court assumes transcript correct. — Where the record discloses no effort to have the transcript corrected, the appellate court will assume that the transcript is correct. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 168 Ga. App. 202, 308 S.E.2d 547 (1983).

Appellee's rights where appellant designates matter to be omitted. — Even if the appellant has designated a relevant portion of the record on appeal for omission, the appellee is entitled, under § 5-6-42, to file his own designation of record to correct the deficiency and, the appellee also has a remedy for correction of the record under subsection (f) of this section, even after it has been transmitted to the Court of Appeals. In the absence of any attempt on the appellee's part to exercise these remedies, the Court of Appeals must assume that the record before it is complete in all relevant respects. *Boats for Sail v. Sears*, 158 Ga. App. 74, 279 S.E.2d 314 (1981).

Transcript of district attorney's closing argument. — The court did not rule on defendant's claim of error that no transcript was made of the district attorney's alleged prejudicial closing argument, since § 17-8-5 does not require that such a transcript be made and there was nothing in the record to show that defendant requested that one be made. *Ford v. State*, 160 Ga. App. 707, 288 S.E.2d 39 (1981).

Where closing arguments were not reported because the parties could not agree as to what had transpired, the court entered

an order reciting the facts based on its recollection, which recitation was final. *Bailey v. State*, 200 Ga. App. 621, 409 S.E.2d 230 (1991).

Jury instruction corrected by a trial transcript amended to correct a typographical error gave an accurate statement of the applicable law and was not error. *Clanton v. State*, 208 Ga. App. 669, 431 S.E.2d 453 (1993).

Supplementation of record after appellate court renders decision. — Once the appellate court renders its decision, § 5-6-48, under which the action originates in the appellate court, becomes the exclusive method for supplementing the record. Therefore, the appellate court's refusal to entertain, on motion for rehearing under subsection (f), under which the action originates in the trial court, the supplementation of the record was not error. However, in holding that what the defendant wore at trial, not shown in the record other than a reference to "prison garb," was new evidence and not subject to subsection (f), the appellate court erred. *State v. Pike*, 253 Ga. 304, 320 S.E.2d 355 (1984).

Ordering trial clerk to submit omitted requests to charge. — The requests to charge are of such importance in an appeal where the trial court's giving of a charge is cited as error that the appellate court will order the clerk of the trial court to submit that portion of the trial record to the appellate court pursuant to subsection (f), and a motion to strike the state's supplementation of the record to include the requests on the ground that it is tardily filed will be denied. *Vick v. State*, 166 Ga. App. 572, 305 S.E.2d 17 (1983).

Indigent appellant must take steps to provide transcript. — Although the trial court declared the appellant indigent, and directed the state to provide him with a trial transcript, he apparently took no steps, by making timely request or otherwise, to insure that the pretrial hearing regarding his motion in limine was duly recorded, nor did he request that the trial court reconstruct this hearing. In the absence of this transcript, the appellate court could not consider the appellant's enumerated error as to the denial of his motion. *Jones v. State*, 187 Ga. App. 25, 369 S.E.2d 314 (1988).

Improper supplementation. — Supplementation of the record by both the defen-

dant and the state by appending attachments to their respective briefs was not an authorized method; the appellate court cannot consider the factual assertions of the parties appearing in briefs when the evidence does not appear on the record. *Leatherwood v. State*, 212 Ga. App. 342, 441 S.E.2d 813 (1994).

Stipulated Transcripts

Submission of transcript prepared by recollection. — Subsections (c), (d) and (g) authorize submission of transcript prepared from recollection only where trial has not been reported or where, for some other reason, actual transcript is not obtainable. *Harrison v. Piedmont Hosp.*, 156 Ga. App. 150, 274 S.E.2d 72 (1980).

Defendant wishing to establish that record is in error. — If defendant in misdemeanor case wishes to establish that record as it appears was in error, he should have availed himself of right of construction of record from recollection under subsection (g). *Williams v. State*, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

Where transcript is unavailable, agreed upon statement of facts in brief may suffice. — In instances where transcript is unavailable and such facts as are necessary for disposition are stated in brief, and state concedes such statement is substantially correct, appellate court may reach decision on agreed upon facts. *Holzmeister v. State*, 156 Ga. App. 94, 274 S.E.2d 109 (1980).

Judicial approval required. — Where a stipulation approved by both counsel does not have attached thereto approval by the trial judge, which is clearly required by subsection (i) of this section, the appellate court has no authority to consider the enumerations of error as having been raised in the trial court in accordance with the statements contained in the stipulation if the appellate court must review the evidence submitted at trial. Under the circumstances the appellate court must affirm the judgment. *Elliott v. Georgia Baptist Convention*, 165 Ga. App. 800, 302 S.E.2d 714 (1983).

Submission requirements. — There is no authority for counsel to file such stipulation in appellate court, and effort of counsel to do so is a nullity. *Martin v. Department of Pub. Safety*, 226 Ga. 723, 177 S.E.2d 243

(1970); *Freeman v. State*, 215 Ga. App. 341, 450 S.E.2d 346 (1994).

Stipulated transcript is subject to same requirements regarding time of filing as transcript by court reporter, that is, that it be filed with clerk of lower court within 30 days of filing of notice of appeal in absence of order of lower court extending time for such filing. *Ponce De Leon Properties, Inc. v. Fulton Cotton-Mills*, 116 Ga. App. 205, 156 S.E.2d 487 (1967).

Trial court's certificate is a final determination of what took place on trial of case. *Park v. State*, 225 Ga. 618, 170 S.E.2d 687 (1969).

Trial court is final arbiter of any differences in preparation of record. *Miller v. State*, 150 Ga. App. 597, 258 S.E.2d 279 (1979); *Pelletier v. Schultz*, 157 Ga. App. 64, 276 S.E.2d 118 (1981); *Pahnke v. State*, 203 Ga. App. 88, 416 S.E.2d 324, cert. denied, 203 Ga. App. 907, 416 S.E.2d 324, U.S. , 113 S. Ct. 273, 121 L. Ed. 2d 201 (1992).

Any issue as to correctness of the record is to be resolved by trial court for that court retains jurisdiction even after case is docketed in appellate court to add additional record. *Pelletier v. Schultz*, 157 Ga. App. 64, 276 S.E.2d 118 (1981).

Trial court controls determination of final record and may supplement record. — Subsection (f) makes clear that trial court controls determination of final record on appeal, and may even supplement record designated by parties on its own motion. *Jones v. Spindel*, 239 Ga. 68, 235 S.E.2d 486 (1977).

Where parties disagree regarding omissions from transcript. — Where parties are unable to agree on stipulation as to that which was omitted from transcript, appellate court is restricted to consider only facts stated in trial judge's certificate. *Firestone v. Walker*, 116 Ga. App. 316, 157 S.E.2d 509 (1967); *Elliott v. Flewellyn*, 174 Ga. App. 486, 330 S.E.2d 185 (1985).

Trial court's disapproval of transcript prepared by appellant bars its use. — Where proposed transcript prepared by appellant is disapproved by trial court, this is sufficient to bar it without necessity of showing that appellee formally objected to it. *Burns v. Barnes*, 154 Ga. App. 802, 270 S.E.2d 57 (1980); *Welch v. Mercer*, 165 Ga. App. 776, 302 S.E.2d 629 (1983).

Stipulated Transcripts (Cont'd)

Statement of testimony approved by neither opposing counsel nor trial court. — Statement of testimony at trial submitted by defense counsel and approved by neither opposing counsel nor trial court may not be considered by appellate court. *Parker v. State*, 154 Ga. App. 668, 269 S.E.2d 518 (1980).

Amendment of brief prepared by appellee's counsel and assented to by appellant's counsel. — Where evidence was not reported at trial, but appellee's counsel prepares a brief of evidence, which was assented to by counsel for appellant, there is no error in court allowing and approving amendment to brief over objection of counsel for appellant. *Kenner v. Whitehead*, 115 Ga. App. 760, 156 S.E.2d 136 (1967).

Trial court's recreating of its own transcript is not subject to review so long as it satisfies requirements of section of being a transcript of evidence (as opposed to conclusions of fact). *Griggs v. Griggs*, 234 Ga. 451, 216 S.E.2d 311 (1975).

Options of judge in recreating transcript. — When trial judge acts under this section to recreate transcript, he may do so by comparing submissions of parties, or by approving (with changes in accord with court's recollection) submission of one party or the other, or he may recreate a transcript by his own composition. *Griggs v. Griggs*, 234 Ga. 451, 216 S.E.2d 311 (1975).

Judge's certification of party's summary. — In absence of agreement by parties, trial court is under no obligation to certify either party's summary of testimony unless it be in accord with his own recollection of the evidence. *Griggs v. Griggs*, 234 Ga. 451, 216 S.E.2d 311 (1975).

Expenses of Recordation and Transcription

Any party has absolute right to have case reported at own expense in all cases. *Dumas v. State*, 131 Ga. App. 79, 205 S.E.2d 119 (1974).

Notice of right to have case reported. — Trial judge is not obligated to inform parties of their right to have case reported at their own expense under subsection (j). *Liberty Loan & Thrift Corp. v. Meeks*, 115 Ga. App. 846, 156 S.E.2d 172 (1967); *Gunter v. Na-*

tional City Bank, 239 Ga. 496, 238 S.E.2d 48 (1977).

Where defendant does not offer to pay for recordation, subsection (j) is not applicable. *Newell v. State*, 237 Ga. 488, 228 S.E.2d 873 (1976).

Nonindigent appellant failing to have trial reported at own expense under subsection (j) must accept consequences, including possibility that record adequate for appeal cannot be prepared by one of the alternate methods provided by section. *Walker v. State*, 153 Ga. App. 89, 264 S.E.2d 565 (1980).

Cost of obtaining transcript falls on party desiring that same be transmitted to appellate court. *Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc.*, 232 Ga. 92, 205 S.E.2d 293 (1974).

While costs of having transcript prepared by court reporter are an expense of appeal, they are not costs of appeal which are recoverable from appellee where appellant is successful in obtaining a reversal in appellate court. *Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc.*, 232 Ga. 92, 205 S.E.2d 293 (1974).

Allocation of costs of supplementing record. — If trial court finds that additional portions designated by appellee are necessary to complete record on appeal, costs must be paid by appellant; only if considered unnecessary on appeal, should costs be taxed against appellee. Trial court's decision will not be reversed absent manifest abuse of discretion. *Jones v. Spindel*, 239 Ga. 68, 235 S.E.2d 486 (1977).

Motion to tape record proceedings. — A party has a right to choose not to go to the expense of hiring a court reporter, and may instead make a reasonable request by written motion at the outset of trial to personally tape record the proceedings for aid in the event of a retrial or appeal. *King v. State*, 176 Ga. App. 137, 335 S.E.2d 439 (1985), overruled on other grounds, *Copeland v. White*, 178 Ga. App. 644, 344 S.E.2d 436 (1986).

A court's arbitrary denial of a properly made motion to tape record the trial proceedings does not constitute reversible error unless actual harm to the requesting party is demonstrated. *King v. State*, 176 Ga. App. 137, 335 S.E.2d 439 (1985), overruled on other grounds, *Copeland v. White*, 178 Ga. App. 644, 344 S.E.2d 436 (1986).

Indigent appellant. — Provision to indigent appellant of transcript of continuance hearing was unnecessary for appeal from denial of motion for continuance where no testimony had been given at hearing. *Miller v. State*, 165 Ga. App. 487, 299 S.E.2d 174 (1983).

No right to reporter services in civil appeal. — An indigent does not have the right to free court reporter services in an appellate, civil proceeding. *Quarterman v. Edwards*, 169 Ga. App. 300, 312 S.E.2d 643 (1983).

Presumption of propriety of judgment where appellant fails to pay for record preparation. — Where plaintiff failed to pay necessary costs for preparation of a record so that no record was filed on appeal, the trial court's granting of a summary judgment in quia timet action was presumed to be supported by sufficient evidence and the judgment was affirmed. *Vaughan v. Buice*, 253 Ga. 540, 322 S.E.2d 282 (1984).

Application

Enumeration of error regarding prosecutor's argument. — Where prosecutor's argument was not transcribed and counsel for plaintiff has made no effort to correct or complete record as provided in section, enumeration of error dealing with alleged improper argument by prosecutor cannot be reviewed. *Carter v. State*, 137 Ga. App. 824, 225 S.E.2d 73 (1976).

Where closing arguments of the attorneys are not reported, and where the defendant does not supplement the record by any of the approved methods, an enumeration dealing with improper closing argument by the district attorney is deemed abandoned. *Ledesma v. State*, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

With neither an original transcript of the offending portions of the assistant district attorney's argument nor a transcript prepared from recollection, the appellate court had to presume that the trial court acted correctly. *Houck v. State*, 173 Ga. App. 388, 326 S.E.2d 567 (1985).

Failure to record evidence produced when tape was played. — Defendant was not prejudiced below or on appeal by the failure of the court reporter to record evidence produced when a tape was played, where each

member of the jury, and defendant's counsel, had a copy of a transcript of the tape, and the transcript was admitted in evidence without objection. *Royal v. State*, 189 Ga. App. 756, 377 S.E.2d 526 (1989).

Section precludes use of § 9-11-43(b) to cure absence of transcript. — Because of this section, affidavit, deposition and oral testimony provisions of § 9-11-43(b), pertaining to hearing of motions based on facts not appearing of record, cannot be used to cure absence of transcript of proceedings for post-trial motions or for appellate review. *Wall v. Citizens & S. Bank*, 274 Ga. 216, 274 S.E.2d 486 (1981).

Amendment of judgment is not a means of bringing evidence to appellate court. — Although amendment to judgment of court, sitting without jury, adding thereto certain statements, findings of fact and conclusions of law, is authorized by former § 9-11-52(b) (see § 9-11-52(c)), amendment is not an authorized means of bringing evidence to appellate court on appeal under this section. *Chapman v. Connor*, 138 Ga. App. 518, 226 S.E.2d 625 (1976).

Duty of appellant who states in notice of appeal that transcript will be transmitted. — Appellant who states in notice of appeal that transcript is to be transmitted as part of appellate record is statutorily mandated to cause court reporter to prepare and file an original and one copy of transcript with clerk of trial court together with court reporter's certificate attesting to correctness thereof within 30 days after filing of notice of appeal unless time is extended as provided in § 5-6-39. *State v. Hart*, 246 Ga. 212, 271 S.E.2d 133 (1980).

Brief cannot serve as record or transcript for demonstrating error or for supporting claim of error. *Holzmeister v. State*, 156 Ga. App. 94, 274 S.E.2d 109 (1980).

Litigant cannot obtain recordings from reporter and employ a typist to transcribe them. — There is no duty on litigant to take recordings of evidence from reporter and have them transcribed by typists employed by litigant. In fact, such a practice cannot be allowed. The reporter has a duty to give a correct report of proceedings on trial, and must certify to correctness of such transcript under subsection (e) of this section. *Diamond v. Liberty Nat'l Bank & Trust Co.*, 228 Ga. 533, 186 S.E.2d 741 (1972).

Application (Cont'd)

Delivery by designated agent. — Under subsection (e), required delivery of transcript to clerk may be by designated agent. *Shield Ins. Co. v. Kemp*, 117 Ga. App. 538, 160 S.E.2d 915 (1968).

Last minute request for reporter. — Motion for continuance should be granted where request for court reporter was made one day in advance but none was available on day of trial. *Massey v. State*, 127 Ga. App. 638, 194 S.E.2d 582 (1972).

Where reporter's hearing disability causes transcription errors. — Where defendant satisfactorily shows that due to reporter's hearing disability, corrected transcript is not true, complete and correct, trial court errs in not granting motions to have another court reporter transcribe tapes. *Wilson v. State*, 246 Ga. 672, 273 S.E.2d 9 (1980).

When failure to record motion for new trial and ruling thereon is harmless error. — In absence of allegation that transcript is inaccurate or that dispute exists as to court's ruling, failure of court reporter to record motion for new trial and ruling is harmless error. *Zachary v. State*, 150 Ga. App. 388, 258 S.E.2d 158 (1979), *aff'd*, 245 Ga. 2, 262 S.E.2d 779 (1980).

No requirement that trial judge order transcription of all habeas hearings. — Section 9-14-20 has reference to pleadings and orders in habeas corpus cases and does not require that trial judge order all habeas hearings to be reported and transcribed. *Hilliard v. Hilliard*, 243 Ga. 424, 254 S.E.2d 372 (1979).

Failure to order transcription of habeas proceeding to regain child custody. — Where, in habeas corpus proceeding, divorced father sought to regain custody of son, trial court did not err in failing to order hearing transcribed. *Hilliard v. Hilliard*, 243 Ga. 424, 254 S.E.2d 372 (1979).

Defense counsel may refuse court's offer to have evidence and proceedings transcribed. — Defense counsel does not jeopardize defendant's right to appeal and thereby ineffectively assist his client when, in misdemeanor trial, he refuses court's offer to have evidence and proceedings transcribed. *Hunt v. State*, 133 Ga. App. 548, 211 S.E.2d 601 (1974).

Presumption that trial court acted correctly when no transcript prepared. — De-

fendant's assertion that the trial court erred in denying his motion for a mistrial made following the prosecutor's closing argument failed, where defendant contended that the prosecutor improperly commented on defendant's failure to testify, yet the prosecutor's closing argument was not transcribed nor was a substitute included in the record. With neither an original transcript of the offending portions of the prosecutor's argument nor a transcript prepared from recollection, the court must presume that the trial court acted correctly. *Peterson v. State*, 204 Ga. App. 532, 419 S.E.2d 757 (1992).

Where the closing arguments of the parties were not recorded but, in an attempt to supplement the record, defendant's attorney filed an affidavit stating that during the state's closing argument, the assistant district attorney and court reporter were permitted, over defendant's objection, to reenact the shooting of the victim, the issues raised were "deemed abandoned" by the defendant's failure to supplement the record by any of the methods approved under subsection (f). *Patterson v. State*, 256 Ga. 740, 353 S.E.2d 338 (1987).

Court correctly provided transcript not including complete voir dire and argument of counsel; provision of those portions of the voir dire in which objections were made or rulings were made by the trial court was a sufficient compliance with the requirements of § 17-8-5, as was limiting transcription of counsel's argument to those matters to which objection was made. *Gardner v. State*, 172 Ga. App. 677, 324 S.E.2d 535 (1984).

Depositions sent by supplemental record. — There was no reversible error and the depositions were considered part of the record, where the court relinquished the depositions to defendants' attorney with the understanding that they were to be filed in the clerk's office and transmitted to the appellate court, when counsel failed to do that, the court ordered that the depositions be sent by supplemental record. *Custom Lighting & Decorating, Ltd. v. Hampshire Co.*, 204 Ga. App. 293, 418 S.E.2d 811 (1992).

Restatement of judge's comments into record. — Where, after a lunch break during the guilt phase of the trial, the trial court made a few remarks to the jury while awaiting the return of the defendant, and the trial

judge later restated his comments, as well as he could remember them, into the record, relating that he had told the jury that the trial would be slightly delayed because the defendant had eaten late, and had congratulated one of the jurors for having been elected to the board of education, there was no violation of this section or § 17-8-5, and any possible constitutional error relating to a defendant's right to be present during all stages of his trial was clearly harmless beyond a reasonable doubt. *Westbrook v. State*, 256 Ga. 776, 353 S.E.2d 504 (1987).

Recollected testimony of witnesses. — Where during a defendant's bench trial, the evidence was not recorded, the defendant did not request or otherwise arrange for recording and, afterwards, the state and defendant were unable to agree on what transpired during trial, the defendant was

afforded the next best thing to a transcript, i.e., the recollected testimony of all witnesses in the criminal trial plus the testimony of persons who observed it. What was recalled was sufficient to conclude that the denial of the defendant's motion for a new trial was proper. *King v. State*, 195 Ga. App. 353, 393 S.E.2d 709 (1990).

Burden of proving bias in jury selection. — Defendant did not meet the burden to complete the record to establish a prima facie case that the state improperly used its peremptory strikes to exclude blacks from the jury, where he did not amend or supplement the record to reflect the necessary facts pursuant to subsection (f), nor was there any stipulation in the record as to the facts pursuant to subsection (i). *Coker v. State*, 207 Ga. App. 482, 428 S.E.2d 578 (1993).

OPINIONS OF THE ATTORNEY GENERAL

The law does not require that verbatim transcripts be prepared and filed in misdemeanor cases; the holding in *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 89 (1956) does not require a contrary ruling

since the lack of a transcript in *Griffin* blocked the appeal, a circumstance which would not apply in a Georgia misdemeanor case. 1970 Op. Att'y Gen. No. U70-69.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 397-544.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 450-458.

ALR. — Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 ALR 725.

Review on appeal of evidence as to genu-

ineness of disputed documents, 12 ALR 212; 27 ALR 319.

Use in state court by counsel or party of tape recorder or other electronic device to make transcript of criminal trial proceedings, 67 ALR3d 1013.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 ALR4th 1049.

5-6-42. Procedure for preparation and filing of transcript of evidence and proceedings where appellant designates matter to be omitted from record on appeal; extensions of time for completion of transcript.

If the appellant designates any matter to be omitted from the record on appeal as provided in Code Section 5-6-37, the appellee may, within 15 days of serving of the notice of appeal by appellant, file a designation of record designating that all or part of the omitted matters be included in the record on appeal. A copy of the designation shall be served on all other parties in the manner prescribed by Code Section 5-6-32. Where there is a transcript of evidence and proceedings to be included in the record on appeal, the appellant shall cause the transcript to be prepared and filed as provided by

Code Section 5-6-41; but, when the appellant has designated that the transcript not be made a part of the record on appeal and its inclusion is by reason of a designation thereof by appellee, the appellee shall cause the transcript to be prepared and filed as referred to in Code Section 5-6-41 at his expense. The party having the responsibility of filing the transcript shall cause it to be filed within 30 days after filing of the notice of appeal or designation by appellee, as the case may be, unless the time is extended as provided in Code Section 5-6-39. In all cases, it shall be the duty of the trial judge to grant such extensions of time as may be necessary to enable the court reporter to complete his transcript of evidence and proceedings. (Ga. L. 1965, p. 18, § 11.)

Cross references. — Filings in clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Contents, form, and certification of transcript, Rules of the Supreme Court of the State of Georgia, Rule 18. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Preparation of records and transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 42. Trans-

mission of transcript, Rules of the Court of Appeals of the State of Georgia, Rule 44. Objections to records or transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 47.

Law reviews. — For article, "Synopsis of 1968 Amendments Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968).

For comment on *Davis v. Davis*, 222 Ga. 579, 151 S.E.2d 123 (1966), see 4 Ga. St. B.J. 259 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TIMELY FILING OF TRANSCRIPT

COST OF TRANSCRIPT

General Consideration

Designation as to precisely which portions of record to be omitted. — Burden is on appellant in first instance to bring up all record and evidence introduced under it bearing on review of his enumerations of error, and in particular it is his duty, if he wishes something omitted, to state it with precision in his notice of appeal pursuant to this section. *Ayers Enters., Ltd. v. Adams*, 131 Ga. App. 12, 205 S.E.2d 16 (1974).

Questions regarding trial proceedings related in brief but not in transcript. — Court of Appeals cannot consider questions regarding proceedings on trial which are related in party's brief but are not incorporated in properly authenticated transcript. *Turner v. Watson*, 139 Ga. App. 648, 229 S.E.2d 126 (1976).

Party having responsibility of preparing and filing transcript refers to either appellant or appellee, and when appellant states in notice of appeal that transcript is to be transmitted as part of appellate record, party having responsibility of preparing and filing transcript refers to appellant. *State v. Hart*, 246 Ga. 212, 271 S.E.2d 133 (1980).

The party having the responsibility of preparing and filing the transcript refers to either the appellant or the appellee. *Long v. City of Midway*, 165 Ga. App. 602, 302 S.E.2d 372, rev'd on other grounds, 251 Ga. 364, 306 S.E.2d 639 (1983).

Appellant must prepare and file transcript. — Under this section appellant has responsibility for causing transcript to be prepared and filed as provided by § 5-6-41 unless appellant has designated that transcript not be included in the record. *Walker*

v. State, 153 Ga. App. 89, 264 S.E.2d 565 (1980).

Duty of appellant who states in notice of appeal that transcript shall be transmitted.

— Appellant who states in notice of appeal that transcript is to be transmitted as part of appellate record is statutorily mandated to cause the court reporter to prepare and file an original and one copy of the transcript with the clerk of trial court together with court reporter's certificate attesting to correctness thereof within 30 days after filing of notice of appeal unless time is extended as provided in § 5-6-39. *State v. Hart*, 246 Ga. 212, 271 S.E.2d 133 (1980).

Where notice of appeal recites that transcript will be filed for inclusion in record, transcript must be filed within 30 days after filing of notice of appeal unless within such time a time extension is applied for and allowed, and failure to timely file transcript or to timely obtain extension of time for so doing requires dismissal of the appeal. *O'Kelley v. McLain*, 123 Ga. App. 669, 182 S.E.2d 189 (1971).

Where the notice of appeal states that a transcript of evidence and proceedings will be filed for inclusion in the record on appeal, the appellant is the party ultimately responsible for filing the transcript. *Curtis v. State*, 168 Ga. App. 235, 308 S.E.2d 599 (1983).

Duty to request transcription from court reporter. — Appellant who appeals felony conviction and states in notice of appeal that transcript is to be transmitted as part of appellate record has continuing duty under section to request, at same time that he files notice of appeal, the court reporter to transcribe the reported testimony. *State v. Hart*, 246 Ga. 212, 271 S.E.2d 133 (1980).

Appellee's right where appellant designates portion to be omitted. — Even if the appellant has designated a relevant portion of the record on appeal for omission, the appellee is entitled, under this section, to file his own designation of record to correct the deficiency and, the appellee also has a remedy for correction of the record under § 5-6-41(f), even after it has been transmitted to the Court of Appeals; in the absence of any attempt on the appellee's part to exercise these remedies, the Court of Appeals must assume that the record before it is complete in all relevant respects. *Boats for*

Sail v. Sears, 158 Ga. App. 74, 279 S.E.2d 314 (1981).

Appellant not obligated to prepare record.

— The obligation of the appellant relates to the transcript, and the obligation for the preparation of the record rests with the clerk. After the appellant has filed a notice of appeal, his duty as to the record is limited to the payment of costs. Where the clerk fails to transmit the record, but there is no indication that this failure is occasioned by the failure of a party to pay costs, the trial court has no discretion to dismiss the appeal. *Long v. City of Midway*, 251 Ga. 364, 306 S.E.2d 639 (1983).

Appellant had no obligation to file transcript until his motion for new trial was disposed of, and the failure to do so or the failure to pay for and file the transcript as soon as it is ready has no controlling bearing on the question of unreasonable delay in filing the transcript after notice of appeal as required by this section. *Galletta v. Hillcrest Abbey W., Inc.*, 185 Ga. App. 20, 363 S.E.2d 265 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 265 (1988).

Appellate court will order trial clerk to submit omitted requests. — The requests to charge are of such importance in an appeal where the trial court's giving of a charge is cited as error that the appellate court will order the clerk of the trial court to submit that portion of the trial record to the appellate court pursuant to § 5-6-41(f), and a motion to strike the state's supplementation of the record to include the requests on the ground that it is tardily filed will be denied. *Vick v. State*, 166 Ga. App. 572, 305 S.E.2d 17 (1983).

State's violation of duty does not excuse defendant's noncompliance. — It is duty of state to request court reporter to transcribe reported testimony and then file transcript after guilty verdict has been returned in a felony case. However, state's duty to request court reporter to transcribe reported testimony in felony conviction has no time limit and thus cannot relieve appellant in felony conviction of duty under this section to request court reporter to transcribe reported testimony at same time that he files notice of appeal. *State v. Hart*, 246 Ga. 212, 271 S.E.2d 133 (1980).

Where defendant ineffectively represented at trial. — Section inapplicable to

General Consideration (Cont'd)

appeal involving criminal defendant who was ineffectively represented by counsel at trial. *Ingram v. State*, 134 Ga. App. 935, 216 S.E.2d 608 (1975).

Cited in *Harper v. Green*, 113 Ga. App. 557, 149 S.E.2d 163 (1966); *Davis v. Davis*, 222 Ga. 579, 151 S.E.2d 123 (1966); *Oglethorpe Co. v. Carmack*, 223 Ga. 128, 153 S.E.2d 541 (1967); *Benecke v. Boyer*, 115 Ga. App. 99, 153 S.E.2d 668 (1967); *Fleming v. Sanders*, 223 Ga. 172, 154 S.E.2d 14 (1967); *Herrington v. Leathers*, 115 Ga. App. 282, 154 S.E.2d 621 (1967); *Byars v. Metropolitan Life Ins. Co.*, 115 Ga. App. 368, 154 S.E.2d 719 (1967); *Walker v. State Hwy. Dep't*, 115 Ga. App. 461, 154 S.E.2d 768 (1967); *Joiner v. State*, 223 Ga. 367, 155 S.E.2d 8 (1967); *Teper v. Weiss*, 115 Ga. App. 621, 155 S.E.2d 730 (1967); *Wilcox v. Wilcox*, 223 Ga. 396, 156 S.E.2d 84 (1967); *Puckett v. Edmonds*, 115 Ga. App. 776, 156 S.E.2d 151 (1967); *Elliott v. Leathers*, 223 Ga. 497, 156 S.E.2d 440 (1967); *Poss v. State*, 116 Ga. App. 264, 157 S.E.2d 33 (1967); *Strickland v. Staten*, 223 Ga. 726, 157 S.E.2d 740 (1967); *Kacoonis v. City of Mountain View*, 224 Ga. 151, 160 S.E.2d 364 (1968); *Shield Ins. Co. v. Kemp*, 117 Ga. App. 538, 160 S.E.2d 915 (1968); *D.G. Mach. & Gage Co. v. Hardy*, 118 Ga. App. 45, 162 S.E.2d 852 (1968); *Hardy v. D.G. Mach. & Gage Co.*, 224 Ga. 818, 165 S.E.2d 127 (1968); *Martin Theaters of Ga., Inc. v. Lloyd*, 118 Ga. App. 835, 165 S.E.2d 909 (1968); *Calloway v. State*, 119 Ga. App. 194, 166 S.E.2d 613 (1969); *Addis v. First Kingston Corp.*, 225 Ga. 231, 167 S.E.2d 656 (1969); *Hernandez v. Hernandez*, 225 Ga. 789, 171 S.E.2d 520 (1969); *O'Quinn v. State*, 121 Ga. App. 231, 173 S.E.2d 409 (1970); *Richardson v. Nu-Way Cleaners & Laundry*, 121 Ga. App. 425, 174 S.E.2d 202 (1970); *Stevens v. Clayton County*, 226 Ga. 528, 175 S.E.2d 831 (1970); *Baxter v. Long*, 122 Ga. App. 500, 177 S.E.2d 712 (1970); *Johnson v. State*, 122 Ga. App. 785, 178 S.E.2d 743 (1970); *Howard v. Smith*, 227 Ga. 427, 181 S.E.2d 47 (1971); *Massey v. State*, 227 Ga. 257, 181 S.E.2d 71 (1971); *Hardwick v. State*, 227 Ga. 467, 181 S.E.2d 376 (1971); *Lowe v. Lowe*, 123 Ga. App. 525, 181 S.E.2d 715 (1971); *Bramlett v. Smith*, 227 Ga. 523, 181 S.E.2d 849 (1971); *Whiteway Laundry & Dry Cleaners, Inc. v. Childs*, 126 Ga. App.

617, 191 S.E.2d 454 (1972); *Smith v. Top Dollar Stores, Inc.*, 129 Ga. App. 60, 198 S.E.2d 690 (1973); *Irby v. Christian*, 130 Ga. App. 375, 203 S.E.2d 284 (1973); *Price v. Cheek*, 130 Ga. App. 506, 203 S.E.2d 751 (1973); *Jackson v. State*, 130 Ga. App. 581, 203 S.E.2d 923 (1974); *Blackstone v. State*, 131 Ga. App. 666, 206 S.E.2d 553 (1974); *Mingo v. State*, 133 Ga. App. 385, 210 S.E.2d 835 (1974); *Gilbert v. Reynolds*, 233 Ga. 488, 212 S.E.2d 332 (1975); *Interstate Fin. Corp. v. Appel*, 233 Ga. 649, 212 S.E.2d 821 (1975); *Coop Mtg. Invs. Assocs. v. Pendley*, 134 Ga. App. 236, 214 S.E.2d 572 (1975); *Taylor v. Whitmire*, 234 Ga. 449, 216 S.E.2d 310 (1975); *Johnson v. Clements*, 135 Ga. App. 495, 218 S.E.2d 109 (1975); *Anderson v. Anderson*, 235 Ga. 115, 218 S.E.2d 846 (1975); *State v. Weeks*, 136 Ga. App. 637, 222 S.E.2d 117 (1975); *Canon v. Canon*, 236 Ga. 99, 222 S.E.2d 381 (1976); *Almond v. Robertson*, 138 Ga. App. 22, 225 S.E.2d 486 (1976); *Reid v. State*, 237 Ga. 106, 227 S.E.2d 24 (1976); *DuBois v. DuBois*, 240 Ga. 314, 240 S.E.2d 706 (1977); *Strother v. C. & S. Nat'l Bank*, 147 Ga. App. 140, 248 S.E.2d 204 (1978); *McAllister v. City of Jonesboro*, 242 Ga. 95, 249 S.E.2d 565 (1978); *Reed v. Arrington-Blount Ford, Inc.*, 148 Ga. App. 595, 252 S.E.2d 13 (1979); *Middleton v. Continental Dev. Corp.*, 153 Ga. App. 144, 264 S.E.2d 689 (1980); *Dampier v. First Bank & Trust Co.*, 153 Ga. App. 756, 266 S.E.2d 539 (1980); *Brown v. Franchiseur*, 247 Ga. 463, 277 S.E.2d 16 (1981); *Harris v. Clark*, 157 Ga. App. 549, 278 S.E.2d 132 (1981); *Edwards v. Davis*, 160 Ga. App. 122, 286 S.E.2d 301 (1981); *Perry v. Freeman*, 163 Ga. App. 186, 293 S.E.2d 381 (1982); *Huttig Sash & Door Co. v. Controlled Bldg. Corp.*, 165 Ga. App. 99, 299 S.E.2d 411 (1983); *Ray v. Standard Fire Ins. Co.*, 168 Ga. App. 116, 308 S.E.2d 221 (1983); *Brown v. Commercial Credit Equip. Corp.*, 172 Ga. App. 568, 323 S.E.2d 822 (1984); *Moon v. DeKalb County Personnel Review Panel*, 173 Ga. App. 486, 326 S.E.2d 844 (1985); *Siler v. Johns*, 173 Ga. App. 692, 327 S.E.2d 810 (1985); *Whitton v. State*, 174 Ga. App. 634, 331 S.E.2d 10 (1985); *Neese v. Long*, 178 Ga. App. 105, 341 S.E.2d 861 (1986); *Baker v. Southern Ry.*, 192 Ga. App. 444, 385 S.E.2d 125 (1989); *Baker v. Southern Ry.*, 260 Ga. 115, 390 S.E.2d 576 (1990); *Department of Human Resources v. Patillo*, 196 Ga. App. 778, 397

S.E.2d 47 (1990); *Hall v. Bussey*, 200 Ga. App. 311, 408 S.E.2d 430 (1991); *Sellers v. Nodvin*, 262 Ga. 205, 415 S.E.2d 908 (1992); *McLelland v. State*, 203 Ga. App. 93, 416 S.E.2d 340 (1992); *Beavers v. Gilstrap*, 210 Ga. App. 46, 435 S.E.2d 267 (1993); *Johnson v. Hardwick*, 212 Ga. App. 44, 441 S.E.2d 450 (1994).

Timely Filing of Transcript

Purpose of time requirements. — The time requirements of this section for filing a transcript are not jurisdictional, but are merely a means of avoiding delay so a case can be presented on the earliest possible calendar in the appellate courts. *Galletta v. Hillcrest Abbey W., Inc.*, 185 Ga. App. 20, 363 S.E.2d 265 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 265 (1988).

Appellant bears burden of timely filing transcript or obtaining extension. — Burden is on appellant to file transcript of evidence within 30 days of filing of notice of appeal, or if transcript cannot be obtained within that time he must obtain extension of time to file transcript. Failure to timely file transcript makes it affirmatively appear failure was caused by appellant. *Fahrig v. Garrett*, 224 Ga. 817, 165 S.E.2d 126 (1968); *Dowling v. State*, 120 Ga. App. 810, 172 S.E.2d 190 (1969).

Court has broad discretion in granting extensions of time. *Brookshire v. J.P. Stevens Co.*, 133 Ga. App. 97, 210 S.E.2d 46 (1974).

Effect of failure to timely file transcript. — Failure to file transcript in accordance with this section is not jurisdictional, and is not ground for dismissal unless accompanied by finding of unreasonableness and lack of excuse, as required by § 5-6-48(c). *Young v. Jones*, 147 Ga. App. 65, 248 S.E.2d 49 (1978); *Llano v. DeKalb County*, 174 Ga. App. 693, 331 S.E.2d 36 (1985); *Galletta v. Hillcrest Abbey W., Inc.*, 185 Ga. App. 20, 363 S.E.2d 265 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 265 (1988).

Failure of the appellant to request an extension for the filing of the transcript is not in itself a ground for dismissal of the appeal absent a judicial determination that the resulting delay was both unreasonable and inexcusable. *McGuirt v. Lawrence*, 193 Ga. App. 611, 389 S.E.2d 2 (1989); *Barmore v. Himebaugh*, 205 Ga. App. 381, 422 S.E.2d 255 (1992).

Party not responsible when not cause of delay. — The trial court has discretion to dismiss an appeal for failure to timely file a transcript only if (1) the delay in filing was unreasonable; and (2) the failure to timely file was inexcusable in that it was caused by some act of the party responsible for filing the transcript. *Boulden v. Fowler*, 202 Ga. App. 237, 414 S.E.2d 263 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 263 (1992).

Failure to get extension. — Failure to get an extension is not, standing alone, a sufficient basis for dismissal. *Boulden v. Fowler*, 202 Ga. App. 237, 414 S.E.2d 263 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 263 (1992).

Dismissal proper where transcript not timely filed nor extension applied for. Where no application was made to trial judge for extension of time for filing of transcript of evidence and no extension was granted, appellee's motion to dismiss appeal because transcript was not filed within 30 days after notice of appeal was filed must be granted. *Culver v. Sisk*, 223 Ga. 519, 156 S.E.2d 352 (1967); *Cole v. Cole*, 228 Ga. 9, 183 S.E.2d 743 (1971); *Thomas v. Satterfield*, 169 Ga. App. 432, 313 S.E.2d 134 (1984).

The trial court did not abuse its discretion in finding that the delay in timely filing a transcript was caused by plaintiffs and was inexcusable, given plaintiffs undisputed failure to seek another extension of the deadline and the trial court's authorization to conclude that they had failed even to order the additional portions of transcript until the deadline had passed. *Van Diviere v. Delta Airlines*, 204 Ga. App. 573, 420 S.E.2d 27, cert. denied, 204 Ga. App. 922, 420 S.E.2d 27 (1992).

Dismissal was supported by a finding that the delay was unreasonable and inexcusable, given a four-month delay in filing the transcript and defendant's apparent lack of diligence in discovering that the transcript would be delayed. *Langston v. State*, 206 Ga. App. 874, 426 S.E.2d 609 (1992).

Filing of transcript in lower court before filing of notice of appeal complies with section. *Logan v. Logan*, 223 Ga. 574, 156 S.E.2d 913 (1967).

Appellant responsible for unreasonable delay. — The fact that an unreasonable delay in the preparation of the transcript is not the

Timely Filing of Transcript (Cont'd)

fault of the appellant does not excuse a filing delay, in the absence of a proper request by the appellant for an extension of time. This being so, the trial court is authorized to dismiss the appeal. *In re G.W.H.*, 168 Ga. App. 845, 310 S.E.2d 573 (1983).

Remand for requisite finding. — Order dismissing appeal, which simply recited that the transcript had not been timely filed but did not include the requisite finding that the resulting delay was both unreasonable and inexcusable, was reversed and remanded for the requisite finding. *Speir v. Nicholson*, 193 Ga. App. 444, 388 S.E.2d 42 (1989).

Although unreasonable delay occurred in ordering a transcript, remand was necessary for the trial court to make affirmative rulings on the record whether the delay was excusable or who was the cause of the delay. *Jackson v. Beech Aircraft Corp.*, 213 Ga. App. 172, 444 S.E.2d 359 (1994).

Cost of Transcript

Cost of transcript falls on party desiring its transmittal. — Cost of obtaining from court reporter a transcript of evidence falls

on party desiring that same be transmitted to appellate court. *Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc.*, 232 Ga. 92, 205 S.E.2d 293 (1974).

Expense where supplementation necessary. — Expense of entire record falls on appellant who includes only parts of it, where trial court approves additional designations by appellee. *Jones v. Spindel*, 239 Ga. 68, 235 S.E.2d 486 (1977).

When appellant designates portion of transcript, and then appellee designates entire transcript of evidence to be material to appeal, and trial judge approves such additional designation, expense of procuring and filing entire transcript of evidence must be borne by appellant. *Brand v. Montega Corp.*, 233 Ga. 35, 209 S.E.2d 583 (1974).

Costs of preparing transcript are not recoverable. — While costs of having transcript prepared by court reporter are an expense of appeal, they are not costs of appeal which are recoverable from appellee where appellant is successful in obtaining a reversal in the appellate court. *Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc.*, 232 Ga. 92, 205 S.E.2d 293 (1974).

5-6-43. Preparation and transmittal of record on appeal by court clerk; retention of copy by clerk; furnishing to Attorney General in capital cases; notification where defendant confined to jail.

(a) Within five days after the date of filing of the transcript of evidence and proceedings by the appellant or appellee, as the case may be, it shall be the duty of the clerk of the trial court to prepare a complete copy of the entire record of the case, omitting only those things designated for omission by the appellant and which were not designated for inclusion by the appellee, together with a copy of the notice of appeal and copy of any notice of cross appeal, with date of filing thereon, and transmit the same, together with the transcript of evidence and proceedings, to the appellate court, together with his certificate as to the correctness of the record. Where no transcript of evidence and proceedings is to be sent up, the clerk shall prepare and transmit the record within 20 days after the date of filing of the notice of appeal. If for any reason the clerk is unable to transmit the record and transcript within the time required in this subsection or when an extension of time was obtained under Code Section 5-6-39, he shall state in his certificate the cause of the delay and the appeal shall not be dismissed. The clerk need not recopy the transcript of evidence and proceedings to be sent up on appeal but shall send up the reporter's original and retain the copy, as referred to in Code Section 5-6-41; and it shall not be necessary that

the transcript be renumbered as a part of the record on appeal. The clerk shall retain an exact duplicate copy of all records and the transcript sent up, with the same pagination, in his office as a permanent record.

(b) Where the accused in a criminal case was convicted of a capital felony, the clerk shall likewise furnish the Attorney General with an exact copy of the record on appeal, for which the clerk shall receive a fee as required by paragraph (6) of subsection (h) of Code Section 15-6-77, to be paid out of funds appropriated to the Department of Law.

(c) Where a defendant in a criminal case is confined in jail pending appeal, it shall be the duty of the clerk to state that fact in his certificate; and it shall be the duty of the appellate court to expedite disposition of the case.

(d) Where a transcript of evidence and proceedings is already on file at the time the notice of appeal is filed, as where the transcript was previously filed in connection with a motion for new trial or for judgment notwithstanding the verdict, the clerk shall cause the record and transcript (where specified for inclusion) to be transmitted as provided in subsection (a) of this Code section within 20 days after the filing of the notice of appeal. (Ga. L. 1965, p. 18, § 12; Ga. L. 1966, p. 493, § 5; Ga. L. 1968, p. 1072, § 6; Ga. L. 1981, p. 1396, § 15; Ga. L. 1992, p. 6, § 5.)

Cross references. — Payment by appellant of costs of transcript preparation prior to transmittal of transcript to appellate court, § 15-6-80. Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Duty

of trial court clerks as to records and transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 41. Preparation of records and transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 42. Objections to records or transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 47.

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One purpose of the requirement of filing transcript under § 5-6-41(e) and this section is to afford local counsel in county where case was tried convenient access to exact duplicate copy of record so as to enable him to easily ascertain proper references to be included in brief and written argument. *Law v. Smith*, 226 Ga. 298, 174 S.E.2d 893 (1970).

Constitutionality. — This section follows the Constitution by stating that cause shall not be dismissed if clerk is unable to transmit record within time required by statute, or when judge grants extension of time, and he shall attach his certificate attesting to cause of delay. *George v. American Credit Control, Inc.*, 222 Ga. 512, 150 S.E.2d 683 (1966).

Appellant responsible for contents of

record. — It is appellant's burden to designate what shall be included in the record on appeal; failing which the Court of Appeals is not authorized to go outside the record and accept assertions of fact in briefs which are not supported by the record, nor accept as fact what is asserted by way of argument in a transcript. *Doe v. State*, 205 Ga. App. 322, 422 S.E.2d 558 (1992).

Late filing of transcript is no longer ground for dismissal of appeals by appellate courts. *Smith v. Smith*, 128 Ga. App. 29, 195 S.E.2d 269 (1973).

Appellant's failure to state whether transcript will be filed. — Failure of appellant to state whether or not transcript will be filed for inclusion in record on appeal is not cause for dismissal of appeal where action of

appellant does not result in delay of transmission of appeal. *Kennedy v. Savannah News-Press, Inc.*, 122 Ga. App. 175, 176 S.E.2d 540 (1970).

Delay in transmittal which has no prejudicial effect. — Where plaintiff's delay in transmitting record is not prejudicial to defendant in causing delay in hearing or decision of appeal, and defendant does not show any change in his position or inequity resulting from delay in transmittal of record, motion to dismiss is denied. *Brawner v. Martin & Jones Produce Co.*, 116 Ga. App. 324, 157 S.E.2d 514 (1967).

Delay caused by appellant's designation that nonexistent transcript be included. — Delay in transmission of appeal to Court of Appeals caused by appellant's designation of transcript to be included when such transcript was nonexistent requires dismissal of appeal. *Kennedy v. Savannah News-Press, Inc.*, 122 Ga. App. 175, 176 S.E.2d 540 (1970).

Appellant not obligated to prepare record. — The obligation of the appellant relates to the transcript, and the obligation for the preparation of the record rests with the clerk. After the appellant has filed a notice of appeal, his duty as to the record is limited to the payment of costs. Where the clerk fails to transmit the record, but there is no indication that this failure is occasioned by the failure of a party to pay costs, the trial court has no discretion to dismiss the appeal. *Long v. City of Midway*, 251 Ga. 364, 306 S.E.2d 639 (1983).

Policy to require appellants to pay before copying material. — The court found nothing unduly burdensome, unreasonable or unfair regarding the policy of the DeKalb County State Court to request payment of costs prior to photocopying the record because the court had lost "a couple of thousand dollars" when appellants failed to pay costs after the record was photocopied. *CRA Transp., Inc. v. Rolls Royce Motors, Inc.*, 204 Ga. App. 825, 420 S.E.2d 757, cert. denied, 204 Ga. App. 921, 420 S.E.2d 757 (1992).

Cited in *Davis v. Davis*, 222 Ga. 579, 151 S.E.2d 123 (1966); *Vezzani v. Vezzani*, 222

Ga. 853, 153 S.E.2d 161 (1967); *DeFee v. I.S. Berlin Press, Inc.*, 115 Ga. App. 206, 154 S.E.2d 452 (1967); *Hornsby v. Rodriguez*, 116 Ga. App. 234, 156 S.E.2d 830 (1967); *Employers' Fire Ins. Co. v. Pennsylvania Millers Mut. Ins. Co.*, 116 Ga. App. 433, 157 S.E.2d 807 (1967); *Kilgo v. Cochran*, 225 Ga. 477, 169 S.E.2d 818 (1969); *Jacobs v. Shiver*, 226 Ga. 284, 174 S.E.2d 415 (1970); *Satcher v. James H. Drew Shows, Inc.*, 122 Ga. App. 548, 177 S.E.2d 846 (1970); *Zeeman Mfg. Co. v. L.R. Sams Co.*, 123 Ga. App. 99, 179 S.E.2d 552 (1970); *Crump v. State*, 124 Ga. App. 502, 184 S.E.2d 367 (1971); *Abel v. J.H. Harvey Co.*, 126 Ga. App. 115, 190 S.E.2d 87 (1972); *Nevels v. City of Sale City*, 128 Ga. App. 65, 195 S.E.2d 658 (1973); *Key Life Ins. Co. v. Mitchell*, 129 Ga. App. 192, 198 S.E.2d 919 (1973); *Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc.*, 232 Ga. 92, 205 S.E.2d 293 (1974); *Summit Ins. Co. v. Mulherin*, 233 Ga. 606, 212 S.E.2d 788 (1975); *Herring v. Herring*, 134 Ga. App. 766, 216 S.E.2d 642 (1975); *Barnett v. Mobley*, 236 Ga. 565, 224 S.E.2d 406 (1976); *Young v. Climatrol S.E. Distrib. Corp.*, 237 Ga. 53, 226 S.E.2d 737 (1976); *Hogan v. City-County Hosp.*, 138 Ga. App. 906, 227 S.E.2d 796 (1976); *Pickett v. Paine*, 139 Ga. App. 508, 229 S.E.2d 90 (1976); *Little v. Thompson Co.*, 140 Ga. App. 238, 230 S.E.2d 316 (1976); *McKissic v. Kresge*, 141 Ga. App. 604, 234 S.E.2d 96 (1977); *Karlsberg v. Hoover*, 142 Ga. App. 590, 236 S.E.2d 520 (1977); *Malloy v. Aetna Cas. & Sur. Co.*, 143 Ga. App. 212, 237 S.E.2d 692 (1977); *Craig Mtg. Co. v. Lanier Hosp.*, 144 Ga. App. 147, 240 S.E.2d 324 (1977); *Ray v. Williams*, 144 Ga. App. 155, 240 S.E.2d 577 (1977); *Whitehead v. Great Cent. Ins. Co.*, 144 Ga. App. 422, 241 S.E.2d 302 (1977); *ITT Indus. Credit Co. v. Burnham*, 152 Ga. App. 641, 263 S.E.2d 482 (1979); *City of Atlanta v. Barton*, 153 Ga. App. 426, 265 S.E.2d 345 (1980); *Neese v. Long*, 178 Ga. App. 105, 341 S.E.2d 861 (1986); *Battallia v. City of Columbus*, 199 Ga. App. 897, 406 S.E.2d 290 (1991); *Rewis v. Shaw*, 208 Ga. App. 876, 432 S.E.2d 617 (1993).

5-6-44. Authorization and procedure generally for filing of joint appeals, motions for new trial, and other motions; division of costs between parties.

(a) Whenever two or more persons are defendants or plaintiffs in an action, and a judgment, verdict, or decree has been rendered against each of them, jointly or severally, or where two or more cases are tried together, the plaintiffs or defendants, as the case may be, shall be entitled, but not required, to file joint appeals, motions for new trial, motions in arrest, motions to set aside, and motions for judgment notwithstanding the verdict, without regard to whether the parties have a joint interest, or whether the cases were merely consolidated for purposes of trial, or whether the cases were simply tried together without an order of consolidation.

(b) Where joint appeals are filed, the appealing parties may nevertheless be entitled, but not required, to file separate enumerations of error in the appellate court.

(c) When separate appeals, motions for new trial, or motions for judgment notwithstanding the verdict are filed, only one transcript of evidence and proceedings (where required) and only one record need be prepared, filed, or transmitted to the appellate court (as the case may be).

(d) In such cases, the court shall by order specify the division of costs between the parties.

(e) This Code section shall apply to both civil and criminal cases. (Ga. L. 1965, p. 18, § 15; Ga. L. 1968, p. 1072, § 4.)

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Intent of section is to allow joint motions for new trial where two cases are consolidated for purposes of trial. *Fair v. State*, 220 Ga. 750, 141 S.E.2d 431 (1965).

Consolidation of cases for trial does not merge cases into one; thus, consent by non-resident plaintiff to consolidation of suits with several plaintiffs does not constitute waiver of venue so that defendant can bring nonresident plaintiff into one of the separate actions as a third-party defendant. *Lou-*

isville & N.R.R. v. Bush, 131 Ga. App. 405, 206 S.E.2d 58 (1974).

Cited in *Moore v. State Hwy. Dep't*, 117 Ga. App. 15, 159 S.E.2d 428 (1967); *Daniel v. Yow*, 226 Ga. 544, 176 S.E.2d 67 (1970); *Marietta Broadcasting Co. v. Advance Mktg. Research, Inc.*, 231 Ga. 13, 200 S.E.2d 134 (1973); *Security Mgt. Co. v. King*, 132 Ga. App. 618, 208 S.E.2d 576 (1974); *Colley v. Dillon*, 158 Ga. App. 416, 280 S.E.2d 425 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appeal and Error, §§ 561, 660.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 29, 86, 151, 222, 422, 509.

ALR. — Right to appellate review, on single appellate proceeding, of separate actions consolidated for trial together in lower court, 36 ALR2d 823.

5-6-45. Operation of notice of appeal as supersedeas in criminal cases; bond; review.

(a) In all criminal cases, the notice of appeal filed as provided in Code Sections 5-6-37 and 5-6-38 shall serve as supersedeas in all cases where a sentence of death has been imposed or where the defendant is admitted to bail. If the sentence is bailable, the defendant may give bond in an amount prescribed by the presiding judge, with security approved by the clerk, conditioned upon the defendant's personal appearance to abide the final judgment or sentence of the court. If the judgment or sentence is or includes a fine which is unconditionally required to be paid, and is not required to be paid over a period of probation, nor as a condition of a suspended or probated sentence, nor as an alternative sentence, the bond may also be conditioned upon payment of the fine at the time the defendant appears to abide the final judgment or sentence.

(b) If the defendant is a corporation which has been convicted as provided in Code Section 17-7-92, the presiding judge, on the motion of the defendant, prosecuting attorney, or on its own motion, may order that supersedeas be conditioned upon the posting of a supersedeas bond. Said order may be entered either before or after the filing of a motion for a new trial or notice of appeal. The bond shall be in an amount prescribed by the presiding judge, with security approved by the clerk, conditioned upon the defendant's appearance, by and through a corporate officer, agent, or attorney at law, to satisfy the judgment, together with all costs and interest. If the corporation fails to make the bond as ordered, the prosecuting attorney or other proper officer may use any and all lawful process and procedures available to enforce and collect the judgment. Should final judgment be entered in favor of the defendant, the presiding judge shall order a refund of all amounts collected in satisfaction of the judgment. The State of Georgia, and its political subdivisions, district attorney, solicitor, sheriff, marshal, all other proper officers, and all agents and employees of the aforementioned persons shall be immune from all civil liability for acts and attempts to enforce and collect a judgment under this subsection.

(c) Any supersedeas bond may be reviewed by the presiding judge on the motion of defendant, prosecuting attorney, or on its own motion, and the court may require new or additional security, or order the bond strengthened, increased, reduced, or otherwise amended as justice may reasonably require. (Laws 1845, Cobb's 1851 Digest, pp. 449, 453; Code 1863, § 4171; Code 1868, § 4203; Code 1873, § 4263; Code 1882, § 4263; Penal Code 1895, § 1077; Penal Code 1910, § 1104; Code 1933, § 6-1005; Ga. L. 1965, p. 18, § 7; Ga. L. 1984, p. 413, § 1; Ga. L. 1992, p. 6, § 5.)

Cross references. — Termination of appeal bonds in criminal cases, § 17-6-1. Review of death sentences by Supreme Court, § 17-10-35 et seq. Supersedeas, Rules of the

Supreme Court of the State of Georgia, Rule 12. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Supersedeas, Rules of the

Court of Appeals of the State of Georgia, Rule 50.

Law reviews. — For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J.

451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION REVOCATION OF BAIL BOND FORFEITURE OF BOND

General Consideration

Trial judge may use discretion in determining if bail should be granted. *Sellers v. Georgia*, 374 F.2d 84 (5th Cir. 1967).

Granting or refusing of bail in felony cases after indictment and conviction is a matter within sound discretion of trial court, and Supreme Court on appeal will not control that discretion unless it has been flagrantly abused. *Watts v. Grimes*, 224 Ga. 227, 161 S.E.2d 286 (1968).

"If sentence is bailable," means where it is bailable in sound discretion of trial judge. *Sellers v. State*, 112 Ga. App. 607, 145 S.E.2d 827 (1965); *Watts v. Grimes*, 224 Ga. 227, 161 S.E.2d 286 (1968); *Holcomb v. State*, 129 Ga. App. 86, 198 S.E.2d 876 (1973).

Continuation of bond until appeal is finally decided. — It would be unrealistic to limit bond to single, specified date and not to require that bond be continued in effect until appeal is finally decided. *State v. Slaughter*, 246 Ga. 174, 269 S.E.2d 446 (1980).

Criminal bonds construed with reasonable strictness. — Criminal bond should be construed with reasonable strictness and surety should not be required to fulfill any conditions he did not covenant to perform, but intention as expressed by parties should be enforced. *Coweta Bonding Co. v. Carter*, 230 Ga. 585, 198 S.E.2d 281 (1973).

Defendant has no right to suspend order revoking probationary sentence by giving of bond, since final judgment of conviction terminates any right to supersedeas. *Morrison v. State*, 126 Ga. App. 565, 191 S.E.2d 449 (1972).

Power to grant nolle prosequi. — In enacting this section, the legislature did not intend to deprive the trial court of its power to grant a nolle prosequi of a subsequent

indictment after the filing of a notice of appeal from an order denying a plea of former jeopardy. *Waters v. State*, 174 Ga. App. 438, 330 S.E.2d 177 (1985).

Considerations for bond. — Release on bond should not be granted unless the court finds that there is no substantial risk the defendant will not appear to answer the judgment following conclusion of the appellate proceedings and that the defendant is not likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice, and that the appeal is not frivolous or taken for delay. *Johnson v. State*, 176 Ga. App. 620, 337 S.E.2d 42 (1985).

Jurisdiction to reconsider order to return property. — Trial court's jurisdiction to reconsider its order to return property, which was removed when the state filed its notice of appeal, is not retroactively supplied by the fact that the appeal was later dismissed by order of the supreme court for lack of a right of appeal in the state. *King v. State*, 208 Ga. App. 623, 432 S.E.2d 109 (1993), *aff'd*, 264 Ga. 282, 443 S.E.2d 844 (1994).

Cited in *State v. Gilmer*, 154 Ga. App. 673, 270 S.E.2d 25 (1980); *Cowan v. State*, 156 Ga. App. 650, 275 S.E.2d 665 (1980); *State v. Crane*, 247 Ga. 779, 279 S.E.2d 695 (1981); *Sharp v. State*, 183 Ga. App. 641, 360 S.E.2d 50 (1987).

Revocation of Bail Bond

Power of trial judge to revoke bail bond pending appeal. — Intent of legislature in passing section was not that supersedeas deprive trial judge of power to revoke bail bond pending appeal. It merely deprived him of his power to execute sentence. *Riggins v. State*, 134 Ga. App. 941, 216 S.E.2d 723 (1975).

Revocation of Bail Bond (Cont'd)

While trial judge may not execute sentence under supersedeas, he may nevertheless revoke bail bond to make the defendant amenable to execution when and if that time should come. *Riggins v. State*, 134 Ga. App. 941, 216 S.E.2d 723 (1975).

Notice and hearing required upon decision to revoke appeal bail bond. — Due process requirements of fifth and fourteenth amendments mandate notice and an evidentiary hearing upon trial court's decision to revoke appeal bail bond. *Riggins v. State*, 134 Ga. App. 941, 216 S.E.2d 723 (1975).

Forfeiture of Bond

Forfeiture pursuant to § 17-6-71. — Forfeiture of appeal or supersedeas bond

granted under this section is accomplished pursuant to § 17-6-71 by issuing rule nisi and writ of scire facias. *State v. Slaughter*, 246 Ga. 174, 269 S.E.2d 446 (1980).

Whether defendant is admitted to bail under § 5-5-46, pending decision on his motion for new trial, or under this section, pending decision on his appeal, forfeiture procedures of § 17-6-71 apply to bond. Under either section, trial judge would exercise his discretion in permitting release on bail. *State v. Slaughter*, 246 Ga. 174, 269 S.E.2d 446 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Suspension of execution of sentences in criminal cases. — Execution of sentence imposed in criminal case is suspended when notice of appeal is filed. 1975 Op. Att'y Gen. No. 75-30.

Execution of probated sentence involving payment of fines and restitution is suspended pending appeal. 1975 Op. Att'y Gen. No. 75-30.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 364-373.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 408-438.

ALR. — Bail pending appeal from conviction, 45 ALR 458.

Constitutional right to bail pending appeal from conviction, 77 ALR 1235.

When appeal is or is not deemed to have been prosecuted "with effect" or "to effect" within condition of supersedeas bond, 163 ALR 410.

Review for excessiveness of sentence in narcotics case, 55 ALR3d 812.

5-6-46. Operation of notice of appeal as supersedeas in civil cases; requirement of supersedeas bond; fixing of amount; procedure upon no or insufficient filing; effect of bond as to liability of surety.

(a) In civil cases, the notice of appeal filed as provided in Code Sections 5-6-37 and 5-6-38 shall serve as supersedeas upon payment of all costs in the trial court by the appellant and it shall not be necessary that a supersedeas bond be filed; provided, however, that upon motion by the appellee, made in the trial court before or after the appeal is docketed in the appellate court, the trial court shall require that supersedeas bond be given with such surety and in such amount as the court may require, conditioned for the satisfaction of the judgment in full, together with costs, interest, and

damages for delay, if for any reason the appeal is dismissed or is found to be frivolous, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, trover, and actions to foreclose mortgages and other security instruments, or when such property is in the custody of the sheriff or other levying officer, or when the proceeds of such property or a bond for its value are in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(b) If supersedeas bond is not filed within the time specified by the judge, or if the bond filed is found insufficient, a bond may be filed at such time as may be fixed by the trial court.

(c) By entering into an appeal or supersedeas bond given pursuant to this Code section, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of notice or an independent action.

(d) Nothing in this Code section shall deprive the superior courts of their separate power to grant supersedeas under paragraph (1) of Code Section 15-6-9, nor deprive the appellate courts of the power to grant supersedeas in such manner as they may determine to meet the ends of justice. (Laws 1845, Cobb's 1851 Digest, pp. 449, 453; Code 1863, § 4171; Code 1868, § 4203; Ga. L. 1870, p. 416, § 1; Code 1873, § 4263; Ga. L. 1880-81, p. 120, § 1; Code 1882, § 4263; Civil Code 1895, § 5552; Civil Code 1910, § 6165; Ga. L. 1917, p. 63, § 1; Code 1933, § 6-1002; Ga. L. 1965, p. 18, § 8; Ga. L. 1994, p. 346, § 1.)

The 1994 amendment, effective July 1, 1994, in the first sentence of subsection (a), inserted "made in the trial court before or after the appeal is docketed in the appellate court,"; and, in subsection (b), deleted "and if the action is not yet docketed with the appellate court," following "insufficient" and "before the action is so docketed" following "at such time", and deleted the former second sentence, which read "After the action is so docketed, motion to require

a bond may be made only in the appellate court".

Cross references. — Supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Supersedeas, Rules of the Court of Appeals of the State of Georgia, Rule 50.

Law reviews. — For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J.

451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966). For article surveying appellate practice and procedure, see 34

Mercer L. Rev. 3 (1982). For annual survey of appellate practice and procedure, see 40 Mercer L. Rev. 51 (1988).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

APPLICABILITY OF AUTOMATIC SUPERSEDEAS PROVISION

EFFECT OF SUPERSEDEAS

SUPERSEDEAS BOND

General Consideration

Payment of costs in trial court is prerequisite. — In civil action, filing of notice of appeal does not serve as supersedeas until all costs in the trial court have been paid. *Chappelaer v. General G.M.C. Trucks, Inc.*, 130 Ga. App. 664, 204 S.E.2d 326 (1974); *Penny Profit Foods, Inc. v. McMullen*, 214 Ga. App. 740, 448 S.E.2d 787 (1994).

In a civil action, the filing of a notice of appeal does not serve as a supersedeas until all costs in the trial have been paid; when all costs are paid, the trial court loses jurisdiction over the case while the appeal is pending. *Duncan v. Ball*, 172 Ga. App. 750, 324 S.E.2d 477 (1984); *Rockdale Awning & Iron Co. v. Kerbow*, 210 Ga. App. 119, 435 S.E.2d 619 (1993).

Appellant's right to initiate posting of bond. — Subsection (a) provides that the appellee shall be entitled to the posting of a supersedeas bond upon its motion. The statute is silent as to whether the appellant can initiate the posting of bond, but no impediment appears which would legally prevent it from doing so if it wishes. *Bank S. v. Roswell Jeep Eagle, Inc.*, 200 Ga. App. 489, 408 S.E.2d 503 (1991).

Judgment determining disposition of property. — In an action by mortgagors against mortgagee and foreclosure sale purchaser to challenge the lawfulness of a nonjudicial foreclosure sale, a supersedeas bond was authorized even though no money judgment was entered against the mortgagors. *Cloud v. Georgia Cent. Credit Union*, 214 Ga. App. 594, 448 S.E.2d 913 (1994).

Appellant proceeding in forma pauperis to be reimbursed for costs. — In the absence of a traverse to his affidavit, it is error to deny the appellant's motion to proceed in forma

pauperis. When such a denial does occur, the appellant must be reimbursed for all costs actually paid by him because of the requirements of subsection (a) of this section. However, the appellant is not entitled to be reimbursed for attorney's fees incurred during his appeal. *Heath v. McGuire*, 167 Ga. App. 489, 306 S.E.2d 741 (1983) (decided prior to 1982 amendment of § 9-15-2).

Uniform Superior Court Rule 6.2 does not apply to motions for supersedeas bonds. *Cloud v. Georgia Cent. Credit Union*, 214 Ga. App. 594, 448 S.E.2d 913 (1994).

Cited in *Swindle v. Swindle*, 221 Ga. 760, 147 S.E.2d 307 (1966); *Hartman v. Brady*, 117 Ga. App. 828, 162 S.E.2d 246 (1968); *Spell v. State*, 225 Ga. 705, 171 S.E.2d 285 (1969); *Jones v. Sheffield*, 122 Ga. App. 574, 178 S.E.2d 299 (1970); *Taylor v. Kohlmeier & Co.*, 123 Ga. App. 493, 181 S.E.2d 496 (1971); *Leonard Bros. Trucking Co. v. Crymes Transps., Inc.*, 124 Ga. App. 341, 183 S.E.2d 773 (1971); *Byers v. Lieberman*, 126 Ga. App. 582, 191 S.E.2d 470 (1972); *Carter v. Burson*, 229 Ga. 748, 194 S.E.2d 472 (1972); *Allied Prods., Inc. v. Peterson*, 233 Ga. 266, 211 S.E.2d 123 (1974); *Turner v. Harper*, 233 Ga. 483, 211 S.E.2d 742 (1975); *McClure v. Hopper*, 234 Ga. 45, 214 S.E.2d 503 (1975); *Lenny v. Lenny*, 235 Ga. 358, 220 S.E.2d 1 (1975); *North Peachtree I-285 Properties, Ltd. v. Hicks*, 136 Ga. App. 426, 221 S.E.2d 607 (1975); *Pilgrim v. Brookfield West, Inc.*, 136 Ga. App. 619, 222 S.E.2d 137 (1975); *Samples v. Greene*, 138 Ga. App. 823, 227 S.E.2d 456 (1976); *Roper v. Motors Ins. Corp.*, 139 Ga. App. 788, 229 S.E.2d 481 (1976); *Billas v. Dwyer*, 140 Ga. App. 774, 232 S.E.2d 102 (1976); *Anthony v. Anthony*, 240 Ga. 155, 240 S.E.2d 45 (1977); *Crymes v. Crymes*, 240 Ga. 721, 242 S.E.2d 30 (1978); *Mitchell v. Excelsior Sales & Imports, Inc.*,

243 Ga. 813, 256 S.E.2d 785 (1979); *Salim v. Salim*, 244 Ga. 513, 260 S.E.2d 894 (1979); *Yield, Inc. v. City of Atlanta*, 152 Ga. App. 174, 262 S.E.2d 483 (1979); *Hawn v. Chastain*, 154 Ga. App. 609, 269 S.E.2d 50 (1980); *State v. Slaughter*, 246 Ga. 174, 269 S.E.2d 446 (1980); *White v. Phillips*, 88 F.R.D. 263 (N.D. Ga. 1980); *Bhatia v. West Cash & Carry Bldg. Materials of Savannah, Inc.*, 157 Ga. App. 145, 276 S.E.2d 656 (1981); *Henson & Henson, P.C. v. Myszka*, 160 Ga. App. 135, 286 S.E.2d 456 (1981); *Landmark First Nat'l Bank v. Schwall & Heuett*, 161 Ga. App. 356, 288 S.E.2d 331 (1982); *Tidwell Homes, Inc. v. Sharif*, 164 Ga. App. 284, 297 S.E.2d 67 (1982); *Georgia Farm Bldgs., Inc. v. Willard*, 165 Ga. App. 325, 299 S.E.2d 181 (1983); *J.M. Clayton Co. v. Martin*, 177 Ga. App. 228, 339 S.E.2d 280 (1985); *Mijajlovic v. State*, 179 Ga. App. 506, 347 S.E.2d 325 (1986); *Davis v. Glaze*, 182 Ga. App. 18, 354 S.E.2d 845 (1987); *State v. Vurgess*, 182 Ga. App. 544, 356 S.E.2d 273 (1987); *Williams v. Natalie Townhouses of Inman Park Condominium Ass'n*, 182 Ga. App. 815, 357 S.E.2d 156 (1987); *Wehunt v. ITT Bus. Communications Corp.*, 183 Ga. App. 560, 359 S.E.2d 383 (1987); *Bullard v. Carreras*, 183 Ga. App. 539, 359 S.E.2d 429 (1987); *Atlanta Propeller Serv., Inc. v. Hoffman GMBH & Co.*, 191 Ga. App. 529, 382 S.E.2d 109 (1989); *Abrahamsen v. McDonald's Corp.*, 197 Ga. App. 624, 398 S.E.2d 861 (1990); *Spicewood, Inc. v. Dykes Paving & Constr. Co.*, 199 Ga. App. 165, 404 S.E.2d 305 (1991); *Fulton Paper Co. v. Reeves*, 212 Ga. App. 341, 441 S.E.2d 881 (1994).

Applicability of Automatic Supersedeas Provision

Filing of notice of appeal acts as supersedeas even in interlocutory appeal. *Lawrence v. Whittle*, 146 Ga. App. 686, 247 S.E.2d 212 (1978).

Automatic supersedeas provision applies to order to vacate judgment consented to by plaintiff. *Phillips Broadcast Equip. Corp. v. Production 70'S, Inc.*, 133 Ga. App. 765, 213 S.E.2d 35 (1975).

Appeal to Supreme Court of contempt order issued by trial court acts as supersedeas pending appeal of order, and for trial court to hold appellant in contempt of the contempt order is error. *Berman v.*

Berman, 231 Ga. 727, 204 S.E.2d 125 (1974).

Upon filing notice of appeal, supersedeas is automatic in all civil cases, except injunction cases. *Simpson v. Simpson*, 233 Ga. 17, 209 S.E.2d 611 (1974).

Filing of notice of appeal in injunction cases does not serve as supersedeas. *Citizens to Save Paulding County v. City of Atlanta*, 236 Ga. 125, 223 S.E.2d 101 (1976).

Injunction cases are exempt from automatic supersedeas. — It was the intention of the legislature in enacting § 9-11-62 to exempt injunction cases from automatic supersedeas provisions of this section. *Howard v. Smith*, 226 Ga. 850, 178 S.E.2d 159 (1970); *Davis v. Creative Land Dev. Corp.*, 230 Ga. 47, 195 S.E.2d 411 (1973).

Appeal from denial of injunction should not establish injunction independently. — No appeal from order denying injunction should have effect of establishing an injunction independently of an order of court entered pursuant to provisions of § 9-11-62(c). *Howard v. Smith*, 226 Ga. 850, 178 S.E.2d 159 (1970).

Effect of Supersedeas

General rule is that supersedeas suspends all further proceedings in the suit in which the judgment superseded is rendered, such as are based upon and relate to the carrying into effect of that judgment. Under this rule the supersedeas, during its pendency, prevents any steps to enforce or carry into effect the judgment, such as issuing an execution based thereon. *International Images, Inc. v. Smith*, 181 Ga. App. 543, 352 S.E.2d 846 (1987).

Notice of appeal serves as supersedeas from time of filing and does not act retroactively. *Vowell v. Carmichael*, 235 Ga. 387, 219 S.E.2d 732 (1975).

Effect of appeal on enforcement of judgment superseded. — Notice of appeal deprives trial court of jurisdiction to proceed towards enforcement of judgment superseded. *Tyree v. Jackson*, 226 Ga. 642, 177 S.E.2d 159 (1970); *Walker v. Walker*, 239 Ga. 175, 236 S.E.2d 263 (1977).

Where there is an appeal from a final judgment, such appeal deprives the trial court of jurisdiction to take further proceedings toward the enforcement of the judgment on appeal because subsection (a) of this section provides that in civil cases a

Effect of Supersedeas (Cont'd)

notice of appeal from such final judgment serves as a supersedeas. *Cohran v. Carlin*, 160 Ga. App. 762, 288 S.E.2d 81 (1981), *aff'd*, 249 Ga. 510, 291 S.E.2d 538 (1982); *Smiway, Inc. v. DOT*, 178 Ga. App. 414, 343 S.E.2d 497 (1986).

Modification of judgment. — Supersedeas prevents trial judge from modifying judgment while it is on appeal. *Jackson v. Martin*, 225 Ga. 170, 167 S.E.2d 135 (1969).

Automatic supersedeas deprives trial court of jurisdiction to modify or alter judgment pending appeal. *Turner v. Harper*, 233 Ga. 483, 211 S.E.2d 742 (1975).

Notice of appeal, with payment of costs, serves as supersedeas of judgment (unless supersedeas bond be required) and while on appeal, trial court is without authority to modify such judgment. *Cohran v. Carlin*, 249 Ga. 510, 291 S.E.2d 538 (1982); *Bank S. v. Roswell Jeep Eagle, Inc.*, 200 Ga. App. 489, 408 S.E.2d 503 (1991).

Trial court correcting mistakes in judgment. — While as a general proposition trial court has power to correct mistakes in judgments, notice of appeal operates as supersedeas and deprives trial court of power to affect judgment appeal, so that subsequent proceedings purporting to supplement, amend, alter or modify the judgment, whether pursuant to statutory or inherent power, are without effect. *Brown v. Wilson Chevrolet-Olds, Inc.*, 150 Ga. App. 525, 258 S.E.2d 139 (1979).

Jurisdiction concerning temporary alimony and attorney fees. — When former husband appeals divorce and alimony judgment and former wife petitions trial court for additional attorney fees prior to entry of remittitur, trial court has authority to award attorney fees for wife's defense of husband's appeal. By filing notice of appeal, husband suspends final judgment and reinvests trial court with jurisdiction as to temporary alimony, including attorney fees even without reservation of jurisdiction. *Staten v. Staten*, 242 Ga. 399, 249 S.E.2d 81 (1978).

Discovery may continue as to matters pending in trial courts notwithstanding grant and appeal of summary judgments as to counterclaims, cross-claims and third party complaints or grant and appeal of partial summary judgments. *Cohran v.*

Carlin, 249 Ga. 510, 291 S.E.2d 538 (1982).

Trial court may try case. — It is not error for trial court to try case while overruling of defendants' motions to dismiss is on appeal. *Cohran v. Carlin*, 249 Ga. 510, 291 S.E.2d 538 (1982).

While trial judge, after certifying bill of exceptions, loses jurisdiction of every issue presented therein, the case is still pending in trial court, and he may conduct interlocutory matters, allow pleadings, and proceed with trial of case, subject to peril that any decision reached which conflicts with decision of appellate court when rendered will thereby be made nugatory. *Cohran v. Carlin*, 249 Ga. 510, 291 S.E.2d 538 (1982).

Supersedeas Bond

Supersedeas bond is permissible as means of assuring compliance with order of court. *Bull v. Bull*, 243 Ga. 72, 252 S.E.2d 494 (1979).

Order requiring supersedeas bond does not operate as condition precedent to transmittal of appeal. — Requiring supersedeas bond on motion of appellee to trial court is intended to prevent notice of appeal from serving as supersedeas, and does not operate as condition precedent to appellant's right to have appeal transmitted to appellate court for review. In absence of such bond as may be required by appropriate court, appellee is free to enforce judgment at his peril pending decision on appeal. *DeFee v. Williams*, 114 Ga. App. 571, 151 S.E.2d 923 (1966).

Orders requiring supersedeas bonds not final. — Since there were matters still pending the cases, orders requiring supersedeas bonds were not final and thus, not subject to direct appeal. *Pruett v. Commercial Bank*, 211 Ga. App. 692, 440 S.E.2d 85 (1994).

Timely motion and order thereon give trial court jurisdiction of subject matter of supersedeas bonds. *Hughes v. Star Bonding Co.*, 137 Ga. App. 661, 224 S.E.2d 863 (1976).

Effect of noncompliance with order to post supersedeas bond. — Failure to comply with order to post supersedeas bond has sole effect of removing any supersedeas features of appeal, and leaves appellee at liberty, if he chooses to do so, to make whatever levy of execution or other action may be available to collect his debt, always remembering that he does so at his peril if judgment is reversed

on appeal. *Hubbard v. Farmers Bank*, 153 Ga. App. 497, 265 S.E.2d 845 (1980).

Failure of appealing party to file supersedeas bond simply means that judgment of trial court may be enforced and is no ground for dismissing appeal. *Hawn v. Chastain*, 246 Ga. 723, 273 S.E.2d 135 (1980).

Failure to post bond by time set may be corrected. — It may happen that an appellant fails to post proper bond by time set in order, but he may correct this default as a matter of right provided case has not been docketed in appellate court. *Hughes v. Star Bonding Co.*, 137 Ga. App. 661, 224 S.E.2d 863 (1976).

Construction of subsection (b). — First sentence of subsection (b) means that where proper motion for supersedeas is filed in trial court, prior to docketing of case in appellate court, trial court may properly set time for appellant to present proper supersedeas bond, and bond so filed is adequate. Further, if bond is not filed or is inadequately filed within time specified, appellant is not entirely cut off from right to file it but he still may file proper bond as a matter of right if case has not yet been

docketed on appeal. *Hughes v. Star Bonding Co.*, 137 Ga. App. 661, 224 S.E.2d 863 (1976).

Court's judgment as to party's ability to pay costs or post bond is final. *Hyman v. Leathers*, 168 Ga. App. 112, 308 S.E.2d 388 (1983).

No abuse of discretion found as to amount of bond. — This section vests the trial court with authority to order a supersedeas bond "in such amount as the court may require." Thus, there was nothing in the record to indicate that the trial court abused its discretion in ordering a \$100,000 supersedeas bond. *Phillips v. Connecticut Nat'l Bank*, 196 Ga. App. 477, 396 S.E.2d 538 (1990).

Considering the amount of debt secured by property foreclosed upon and defendant's actions in delaying foreclosure sale by repeated bankruptcy filings as well as the filing of appeals, the trial court did not abuse its discretion by requiring a supersedeas bond in the amount of \$340,000. *Cloud v. Georgia Cent. Credit Union*, 214 Ga. App. 594, 448 S.E.2d 913 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 323-351, 364-373.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 408-438.

ALR. — Reversal as affecting purchase of property involved in suit, pending appeal without supersedeas, 36 ALR 421.

Failure of obligee in supersedeas bond to accept protection thereof or his act inconsistent therewith as affecting liability on bond, 53 ALR 807.

Amount named in appeal or supersedeas bond as the maximum limit of sureties' liability or as a limitation of the amount which they undertake shall by paid on the judgment appealed from, 87 ALR 257.

Appeal from award of injunction as stay or supersedeas, 93 ALR 709.

Liability of surety on appeal or supersedeas bond as affected by death of principal before decision on appeal, 94 ALR 971.

Claim of obligee or surety on supersedeas bond, or other bond given in course of

litigation, as entitled to preference over mortgage bondholders of railroad or other corporation, 113 ALR 494.

Measure and items of damages recoverable upon a suspending or supersedeas bond on appeal from an order appointing a receiver or confirming such appointment, 117 ALR 1274.

Right to stay without bond or other security pending appeal from judgment or order against executor, administrator, guardian, trustee, or other fiduciary who represents interests of other person, 119 ALR 931.

Liability on supersedeas bond which was legally insufficient to effect stay, where enforcement of judgment was in fact suspended, 120 ALR 1062.

When appeal is or is not deemed to have been prosecuted "with effect" or "to effect" within condition of supersedeas bond, 163 ALR 410.

Attorneys' fees paid by appellee in resisting unsuccessful appellate review as damages recoverable on appeal bond, 37 ALR2d 525.

Stay or supersedeas on appellate review in mandamus proceeding, 88 ALR2d 420.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 ALR2d 448.

Effect of supersedeas or stay on antecedent levy, 90 ALR2d 483.

Measure and amount of damages recoverable under supersedeas bond in action involving recovery or possession of real estate, 9 ALR3d 330.

Appealability of order directing payment of money into court, 15 ALR3d 568.

5-6-47. Operation of notice of appeal and affidavit of indigence as supersedeas in civil cases; procedure for contests as to truth of affidavit.

(a) In all civil cases where the party taking an appeal files an affidavit stating that because of his indigence he is unable to pay costs or to post a supersedeas bond, if any, as may be required by the trial judge as provided in Code Section 5-6-46, the notice of appeal and affidavit of indigence shall act as supersedeas.

(b) Any party at interest or his agent or attorney may contest the truth of the affidavit of indigence by verifying affirmatively under oath that the same is untrue. The issue thereby formed shall be heard and determined by the trial court under the rules of the court. The judgment of the court on all issues of fact concerning the ability of a party to pay costs or give bond shall be final. (Ga. L. 1965, p. 18, § 9; Ga. L. 1966, p. 723, § 1.)

Cross references. — Supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Supersedeas, Rules of the Court of Appeals of the State of Georgia, Rule 50.

Law reviews. — For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 6166 and former Code 1933, § 6-1002, as it read prior to revision by Ga. L. 1965, p. 18, § 9 are included in the annotations for this Code section.

Truth of paupers affidavit must be attacked in court below, not in Court of Appeals. *Mark Trail Campgrounds, Inc. v. Field Enterprises, Inc.*, 140 Ga. App. 608, 231 S.E.2d 468 (1976).

Purpose of traverse to pauper's affidavit is simply to allow hearing on ability to pay. *Hubbard v. Farmers Bank*, 153 Ga. App. 497, 265 S.E.2d 845 (1980).

Effect of successful traverse of pauper's affidavit. — Where appellant's pauper's affi-

davit is successfully traversed, appellant is required to pay court costs and provide such supersedeas bond as is appropriate to the circumstances, and upon failure to comply therewith authorizes dismissal. *Spaulding v. Rich's, Inc.*, 144 Ga. App. 467, 241 S.E.2d 584 (1978).

Remedy for failure to file or frivolously filing pauper's affidavit is not dismissal of appeal but divestiture of the protection of supersedeas. *Hubbard v. Farmers Bank*, 153 Ga. App. 497, 265 S.E.2d 845 (1980).

Finding that party not indigent not reviewable. — A trial court's finding that a party was able to pay the costs of preparing a record is not reviewable even though no opposing affidavit challenging the party's

affidavit of indigency was filed. *Saylors v. Emory Univ.*, 187 Ga. App. 460, 370 S.E.2d 625, cert. denied, 187 Ga. App. 908, 370 S.E.2d 625 (1988).

Ordinarily, under subsection (b) of this section and § 9-15-2(a)(2), a trial court's findings concerning a party's indigency are not reviewable in cases where the affidavit of indigency has been traversed by an opposing affidavit. *Quaterman v. Weiss*, 212 Ga. App. 563, 442 S.E.2d 813 (1994).

An insolvent corporation may make a pauper affidavit. *Brunswick Timber Co. v. Guy*, 52 Ga. App. 617, 184 S.E. 426 (1936) (decided under former Code 1933, § 6-1002).

Must contain statement that inability to pay is due to poverty. — It is essential to sufficiency of pauper's affidavit that it include statement that inability of affiant to pay costs is "because of his poverty," and,

being without such statement, neither affiant as plaintiff in error nor his attorneys will be relieved from payment of costs. *Stevens v. Bibb Mfg. Co.*, 45 Ga. App. 282, 164 S.E. 221 (1932) (decided under former Civil Code 1910, § 6166).

Cited in *Fowler v. Stansell*, 221 Ga. 630, 146 S.E.2d 726 (1966); *Green v. Fuller*, 223 Ga. 204, 154 S.E.2d 220 (1967); *Tootle v. Player*, 225 Ga. 431, 169 S.E.2d 340 (1969); *McClure v. Hopper*, 234 Ga. 45, 214 S.E.2d 503 (1975); *Potts v. State*, 236 Ga. 230, 223 S.E.2d 120 (1976); *Chambliss v. Roberson*, 164 Ga. App. 579, 298 S.E.2d 550 (1982); *Parks v. Atlanta Pub. Sch. Sys. Bd. of Educ.*, 168 Ga. App. 572, 309 S.E.2d 645 (1983); *Rosemond v. Prudential Property & Cas. Ins. Co.*, 170 Ga. App. 189, 316 S.E.2d 541 (1984); *Ball v. Duncan*, 174 Ga. App. 341, 330 S.E.2d 160 (1985).

RESEARCH REFERENCES

C.J.S. — 4 C.J.S., Appeal and Error, §§ 322-324.

ALR. — Reversal as affecting purchase of property involved in suit, pending appeal without supersedeas, 36 ALR 421.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal, 100 ALR 321; 55 ALR2d 1072.

When appeal is or is not deemed to have been prosecuted "with effect" or "to effect"

within condition of supersedeas bond, 163 ALR 410.

Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant, 11 ALR2d 607.

Determination of indigency of accused entitling him to transcript or similar record for purposes of appeal, 66 ALR3d 954.

5-6-48. Grounds for dismissal of appeal; amendments; correcting or supplementing record or transcript; effect of dismissal of appeal upon cross appeal; effect of deficiencies upon consideration of appeal.

(a) Failure of any party to perfect service of any notice or other paper hereunder shall not work dismissal; but the trial and appellate courts shall at any stage of the proceeding require that parties be served in such manner as will permit a just and expeditious determination of the appeal and shall, when necessary, grant such continuance as may be required under the circumstances.

(b) No appeal shall be dismissed or its validity affected for any cause nor shall consideration of any enumerated error be refused, except:

(1) For failure to file notice of appeal within the time required as provided in this article or within any extension of time granted hereunder;

(2) Where the decision or judgment is not then appealable; or

(3) Where the questions presented have become moot.

(c) No appeal shall be dismissed by the appellate court nor consideration of any error therein refused because of failure of any party to cause the transcript of evidence and proceedings to be filed within the time allowed by law or order of court; but the trial court may, after notice and opportunity for hearing, order that the appeal be dismissed where there has been an unreasonable delay in the filing of the transcript and it is shown that the delay was inexcusable and was caused by such party. In like manner, the trial court may order the appeal dismissed where there has been an unreasonable delay in the transmission of the record to the appellate court, and it is seen that the delay was inexcusable and was caused by the failure of a party to pay costs in the trial court or file an affidavit of indigence; provided, however, that no appeal shall be dismissed for failure to pay costs if costs are paid within 20 days (exclusive of Saturdays, Sundays, and legal holidays) of receipt by the appellant of notice, mailed by registered or certified mail, of the amount of costs.

(d) At any stage of the proceedings, either before or after argument, the court shall by order, either with or without motion, provide for all necessary amendments, require the trial court to make corrections in the record or transcript or certify what transpired below which does not appear from the record on appeal, require that additional portions of the record or transcript of proceedings be sent up, or require that a complete transcript of evidence and proceedings be prepared and sent up, or take any other action to perfect the appeal and record so that the appellate court can and will pass upon the appeal and not dismiss it. If an error appears in the notice of appeal, the court shall allow the notice of appeal to be amended at any time prior to judgment to perfect the appeal so that the appellate court can and will pass upon the appeal and not dismiss it.

(e) Dismissal of the appeal shall not affect the validity of the cross appeal where notice therefor has been filed within the time required for cross appeals and where the appellee would still stand to receive benefit or advantage by a decision of his cross appeal.

(f) Where it is apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing, what judgment or judgments were appealed from or what errors are sought to be asserted upon appeal, the appeal shall be considered in accordance therewith notwithstanding that the notice of appeal fails to specify definitely the judgment appealed from or that the enumeration of errors fails to enumerate clearly the errors sought to be reviewed. An appeal shall not be dismissed nor consideration thereof refused because of failure of the court reporter to file the transcript of evidence and proceedings within the time allowed by law or order of court unless it affirmatively appears from the record that the failure was caused by the appellant. (Ga. L. 1965, p. 18, § 13; Ga. L. 1965, p. 240, § 1; Ga. L. 1966, p. 493, § 10; Ga. L. 1968, p. 1072, §§ 2, 3; Ga. L. 1972, p. 624, § 1; Ga. L. 1978, p. 1986, § 1.)

Cross references. — Briefs of appellant and cross appellant, Rules of the Supreme Court of the State of Georgia, Rule 39. Service on opposing parties, Rules of the Supreme Court of the State of Georgia, Rule 43. Argument and citation of authority, Rules of the Supreme Court of the State of Georgia, Rule 45. Judgments deemed included and presented, Rules of the Supreme Court of the State of Georgia, Rule 46. Presenting issue where record supplemented, Rules of the Supreme Court of the State of Georgia, Rule 48. Motions in civil actions, hearing, Uniform Superior Court Rules, Rule 6.3. Transcript costs, Uniform Superior Court Rules, Rule 41.3.

Law reviews. — For article, "Synopsis of 1968 Amendments Appellate Procedure Act

and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968). For article discussing Georgia court decision on questions of appellate practice and procedure, see 31 Mercer L. Rev. 1 (1979). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For annual survey of appellate practice and procedure, see 40 Mercer L. Rev. 51 (1988).

For comment on *Davis v. Davis*, 222 Ga. 579, 151 S.E.2d 123 (1966), see 4 Ga. St. B.J. 259 (1967). For comment on *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973), appearing below, see 8 Ga. L. Rev. 526 (1974).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

FAILURE TO PERFECT SERVICE

MANDATORY DISMISSAL OF APPEAL

1. IN GENERAL

2. FAILURE TO TIMELY FILE NOTICE OF APPEAL

3. APPEALS FROM NONFINAL JUDGMENTS

4. MOOT QUESTIONS

DELAY IN FILING TRANSCRIPT

1. IN GENERAL

2. UNREASONABLE, INEXCUSABLE DELAY

DELAY OCCASIONED BY NONPAYMENT OF COSTS

1. IN GENERAL

2. UNREASONABLE, INEXCUSABLE DELAY

AMENDMENT OF RECORD

NOTICE OF APPEAL

APPLICATION GENERALLY

General Consideration

Constitutionality of section discussed. — See *Brckett v. Allison*, 119 Ga. App. 632, 168 S.E.2d 611 (1969).

Purpose of section. — Section contains specific and limited grounds for dismissal and is replete with provisions for liberal amendment to meet technical objections to appeals, to the end of facilitating proper decision on merits. *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Section opens notice of appeal to extrinsic construction for first time and puts burden

on court to examine orders themselves in determining from which orders an appeal has been taken. *Brckett v. Allison*, 119 Ga. App. 632, 168 S.E.2d 611 (1969).

Entire section gives to court a very broad discretion. *Brookshire v. J.P. Stevens Co.*, 133 Ga. App. 97, 210 S.E.2d 46 (1974).

Appellate courts should reach merits of appeals where possible. — It is the policy of both appellate courts in Georgia to attempt to avoid dismissing appeals and to try to reach the merits of every case when it can be done consistent with mandate of the law. *Johnson v. Daniel*, 135 Ga. App. 926, 219 S.E.2d 579 (1975); *Gilland v. Leathers*, 141 Ga. App. 680, 234 S.E.2d 338 (1977); *Corbin*

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v. First Nat'l Bank, 151 Ga. App. 33, 258 S.E.2d 697 (1979).

Section does not limit judicial authority under rule regarding dismissal. — Judicial authority under Rule 39, Rules of the Supreme Court to dismiss appeal for failure to comply with order to file enumeration of error is not prohibited by § 5-6-30, which expresses an intent to avoid dismissals, and is not limited by the three grounds for dismissal contained in this section. *Taylor v. Columbia County Planning Comm'n*, 232 Ga. 155, 205 S.E.2d 287 (1974).

Former Rule 14(a) of the Rules of the Supreme Court (see Rule 39) is directory and its violation does not constitute one of the limited grounds for dismissal as prescribed by this section. *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973).

What must be shown to order dismissal. — In order for the trial court to order the dismissal of an appeal, it must appear that the delay between the filing of the notice of appeal and the subsequent filing of the transcript was unreasonable and that the unreasonable delay was inexcusable. *Gay v. City of Rome*, 157 Ga. App. 368, 277 S.E.2d 741 (1981).

Discretion of court. — In passing upon issues of unreasonable delay and inexcusable delay, the trial court has discretion. However, it is a legal discretion which is subject to review in the appellate courts. *Gay v. City of Rome*, 157 Ga. App. 368, 277 S.E.2d 741 (1981).

Effect of dismissal on cross-appeal. — Pursuant to subsection (e), dismissal of the appeal does not affect the validity of a cross-appeal. It is only when the appeal is dismissed for lack of jurisdiction that a cross-appeal which does not have an independent ground for jurisdiction must also be dismissed. *First Union Nat'l Bank v. Floyd*, 198 Ga. App. 99, 400 S.E.2d 393 (1990), cert. denied, 198 Ga. App. 897, 400 S.E.2d 393 (1991).

Formal recitation of conditions of grant or denial not required. — This section does not, by its terms, require the trial court to make a formal recitation of the conditions upon which the trial court grants or denies a motion to dismiss an appeal. Where the

challenged order complies with the requirements of this section, the trial court is not required to make findings of fact and conclusions of law in its order denying the motion to dismiss the appeal. *Gay v. City of Rome*, 157 Ga. App. 368, 277 S.E.2d 741 (1981).

Hearing. — There is no conflict between the "opportunity for hearing" on a motion to dismiss, as set forth in subsection (c), and Uniform Superior Court Rule 6.3, and where there is full opportunity to respond to an opponent's motion to dismiss, the court does not err in granting the motion without an oral hearing. *Glen Restaurants, Inc. v. Building 5 Assocs.*, 189 Ga. App. 327, 375 S.E.2d 492, cert. denied, 189 Ga. App. 912, 375 S.E.2d 492 (1988).

Cited in *Williams v. State*, 112 Ga. App. 566, 145 S.E.2d 765 (1965); *Undercofler v. McLennan*, 221 Ga. 613, 146 S.E.2d 635 (1966); *Banks v. Banks*, 221 Ga. 626, 146 S.E.2d 636 (1966); *Cade v. Burson*, 221 Ga. 715, 146 S.E.2d 761 (1966); *Gibson v. Hodges*, 221 Ga. 779, 147 S.E.2d 329 (1966); *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966); *Birdwell v. Pippen*, 113 Ga. App. 202, 147 S.E.2d 673 (1966); *Seaton v. Redisco, Inc.*, 113 Ga. App. 256, 147 S.E.2d 828 (1966); *Dawn Mem. Park v. Southern Cem. Consultants of Ga., Inc.*, 113 Ga. App. 814, 149 S.E.2d 760 (1966); *Adams v. Morgan*, 114 Ga. App. 180, 150 S.E.2d 556 (1966); *LeCraw v. L.P.D., Inc.*, 114 Ga. App. 281, 150 S.E.2d 927 (1966); *Sayers v. Rothberg*, 222 Ga. 626, 151 S.E.2d 445 (1966); *Puckett v. Puckett*, 222 Ga. 653, 151 S.E.2d 767 (1966); *Louisville & N.R.R. v. Clark*, 114 Ga. App. 755, 152 S.E.2d 694 (1966); *Hood v. Akins*, 114 Ga. App. 733, 152 S.E.2d 704 (1966); *Hicks v. Maple Valley Corp.*, 223 Ga. 69, 153 S.E.2d 547 (1967); *Norbo Trading Corp. v. Wohlmuth*, 223 Ga. 258, 154 S.E.2d 224 (1967); *Griffith v. Morgan*, 115 Ga. App. 518, 154 S.E.2d 822 (1967); *Turner v. Bogle*, 115 Ga. App. 710, 155 S.E.2d 667 (1967); *State Hwy. Dep't v. Hicks*, 115 Ga. App. 703, 155 S.E.2d 689 (1967); *Liberty Loan & Thrift Corp. v. Meeks*, 115 Ga. App. 846, 156 S.E.2d 172 (1967); *Ward v. Ward*, 115 Ga. App. 778, 156 S.E.2d 210 (1967); *Hayes v. State*, 116 Ga. App. 260, 157 S.E.2d 30 (1967); *Byrd v. Moore Ford Co.*, 116 Ga. App. 292, 157 S.E.2d 41 (1967); *Cotton States Mut. Ins. Co.*

v. Tiller, 116 Ga. App. 275, 157 S.E.2d 57 (1967); Olds v. Hair, 116 Ga. App. 401, 157 S.E.2d 559 (1967); Peach v. State, 116 Ga. App. 703, 158 S.E.2d 701 (1967); Bailey v. State, 224 Ga. App. 48, 159 S.E.2d 286 (1968); Mixon v. Hall, 117 Ga. App. 626, 161 S.E.2d 429 (1968); McKinney v. Schaefer, 117 Ga. App. 595, 161 S.E.2d 446 (1968); Lake Spivey Parks v. Jones, 118 Ga. App. 60, 162 S.E.2d 801 (1968); Wooten v. State ex rel. Bagby, 118 Ga. App. 366, 163 S.E.2d 870 (1968); Fahrig v. Garrett, 224 Ga. 817, 165 S.E.2d 126 (1968); Hardy v. D.G. Mach. & Gage Co., 224 Ga. 818, 165 S.E.2d 127 (1968); Daniels v. Allen, 118 Ga. App. 722, 165 S.E.2d 449 (1968); Jones v. State, 225 Ga. 114, 166 S.E.2d 350 (1969); Carroll v. Askew, 119 Ga. App. 224, 166 S.E.2d 635 (1969); Stephens v. State, 119 Ga. App. 674, 168 S.E.2d 333 (1969); Shepherd v. Shepherd, 225 Ga. 455, 169 S.E.2d 314 (1969); Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969); Harrison v. State, 120 Ga. App. 812, 172 S.E.2d 328 (1969); Genins v. Genins, 226 Ga. 70, 172 S.E.2d 416 (1970); Reese v. State, 121 Ga. App. 189, 173 S.E.2d 351 (1970); O'Quinn v. State, 121 Ga. App. 231, 173 S.E.2d 409 (1970); Teppenpaw v. Blalock, 121 Ga. App. 320, 173 S.E.2d 442 (1970); Jacobs v. Shiver, 226 Ga. 284, 174 S.E.2d 415 (1970); Stewart v. Church, 121 Ga. App. 783, 175 S.E.2d 46 (1970); Satcher v. James H. Drew Shows, Inc., 122 Ga. App. 548, 177 S.E.2d 846 (1970); Hicks v. Seaboard Coast Line R.R., 123 Ga. App. 95, 179 S.E.2d 532 (1970); Wellcraft Mfg., Inc. v. Troutman, 123 Ga. App. 321, 180 S.E.2d 588 (1971); Norman v. Walker, 123 Ga. App. 413, 181 S.E.2d 310 (1971); Rusk v. Rusk, 227 Ga. 756, 183 S.E.2d 209 (1971); Faulkner v. Home Fed. Sav. & Loan Ass'n, 124 Ga. App. 360, 183 S.E.2d 615 (1971); Buffalo Holding Co. v. Shores, 124 Ga. App. 868, 186 S.E.2d 339 (1971); Servall v. Southern Cross Indus., Inc., 125 Ga. App. 88, 186 S.E.2d 499 (1971); Smith v. Mayor of Lake City, 125 Ga. App. 772, 189 S.E.2d 104 (1972); Meeks v. Kirkland, 125 Ga. App. 792, 189 S.E.2d 107 (1972); Brown v. Hemperley, 125 Ga. App. 828, 189 S.E.2d 131 (1972); Palm Beach Inv. Properties, Inc. v. Dingman, 126 Ga. App. 17, 189 S.E.2d 906 (1972); Slay v. Brady, 126 Ga. App. 249, 190 S.E.2d 445 (1972); Pope v. State, 126 Ga. App. 488, 191 S.E.2d 115 (1972); Housing Auth. v. Marbut Co., 229

Ga. 403, 191 S.E.2d 785 (1972); Dixie Mgt. Corp. v. Hubbard, 127 Ga. App. 401, 194 S.E.2d 118 (1972); Model Cleaners & Laundry, Inc. v. Per Corp., 127 Ga. App. 559, 194 S.E.2d 258 (1972); George v. Southern Ry. Sys., 127 Ga. App. 583, 194 S.E.2d 284 (1972); Burroughs Corp. v. Outside Carpets, Inc., 127 Ga. App. 622, 194 S.E.2d 487 (1972); Reinhardt v. Parker, 129 Ga. App. 312, 199 S.E.2d 638 (1973); Candler v. Orkin, 129 Ga. App. 721, 200 S.E.2d 909 (1973); Tapley Fin. Corp. v. Citizens & S. Bank, 129 Ga. App. 781, 201 S.E.2d 482 (1973); Irby v. Christian, 130 Ga. App. 375, 203 S.E.2d 284 (1973); G.M.J. v. State, 130 Ga. App. 420, 203 S.E.2d 608 (1973); Jackson v. State, 130 Ga. App. 581, 203 S.E.2d 923 (1974); Fleming v. Phoenix of Hartford Ins. Co., 130 Ga. App. 771, 204 S.E.2d 460 (1974); Azar v. Baird, 232 Ga. 81, 205 S.E.2d 273 (1974); Dunbar v. Green, 232 Ga. 188, 205 S.E.2d 854 (1974); Blackshear v. Blackshear, 232 Ga. 312, 206 S.E.2d 429 (1974); Padgett v. Cowart, 232 Ga. 633, 208 S.E.2d 455 (1974); Bethsaida Dev., Inc. v. Charter Land & Housing Corp., 232 Ga. 641, 208 S.E.2d 462 (1974); Von Waldner v. Baldwin/Cheshire, Inc., 133 Ga. App. 23, 209 S.E.2d 715 (1974); Carroll v. Cates, 134 Ga. App. 10, 213 S.E.2d 120 (1975); Wade v. Ray, 234 Ga. 234, 214 S.E.2d 923 (1975); Scroggins v. Ridge Nassau Corp., 135 Ga. App. 547, 218 S.E.2d 448 (1975); Lackey v. State, 135 Ga. App. 632, 218 S.E.2d 648 (1975); Lee v. Goldner, 135 Ga. App. 744, 219 S.E.2d 5 (1975); Whitehead v. Hasty, 235 Ga. App. 331, 219 S.E.2d 443 (1975); Hughes Motor Co. v. First Nat'l Bank, 136 Ga. App. 295, 220 S.E.2d 782 (1975); Tamplin v. State, 235 Ga. 774, 221 S.E.2d 455 (1975); Herring v. Herring, 236 Ga. 43, 222 S.E.2d 331 (1976); Canon v. Canon, 236 Ga. 99, 222 S.E.2d 381 (1976); Wilson v. Coite Somers Co., 138 Ga. App. 455, 226 S.E.2d 277 (1976); Hogan v. City-County Hosp., 138 Ga. App. 906, 227 S.E.2d 796 (1976); State v. Gethers, 139 Ga. App. 1, 227 S.E.2d 832 (1976); Kowalski v. State, 139 Ga. App. 12, 228 S.E.2d 19 (1976); Hiller v. Culbreth, 139 Ga. App. 351, 228 S.E.2d 374 (1976); Pickett v. Paine, 139 Ga. App. 508, 229 S.E.2d 90 (1976); May v. May, 139 Ga. App. 672, 229 S.E.2d 145 (1976); Beatty v. Underground Atlanta, 237 Ga. 844, 229 S.E.2d 615 (1976); Hudson v. Columbus, 139 Ga. App. 789, 229

General Consideration (Cont'd)

S.E.2d 671 (1976); *Little v. Thompson Co.*, 140 Ga. App. 238, 230 S.E.2d 316 (1976); *Davis v. Davis*, 238 Ga. 143, 231 S.E.2d 753 (1977); *Termplan, Inc. v. Dorsey*, 141 Ga. App. 47, 232 S.E.2d 402 (1977); *Ellis v. Continental Ins. Co.*, 141 Ga. App. 809, 234 S.E.2d 377 (1977); *Pickens County v. Darnell*, 142 Ga. App. 281, 235 S.E.2d 677 (1977); *Ward v. State*, 239 Ga. 205, 236 S.E.2d 365 (1977); *Holloway v. Giddens*, 239 Ga. 195, 236 S.E.2d 491 (1977); *Foskey v. Dockery*, 143 Ga. App. 63, 237 S.E.2d 532 (1977); *Malloy v. Aetna Cas. & Sur. Co.*, 143 Ga. App. 212, 237 S.E.2d 692 (1977); *Owens v. State*, 144 Ga. App. 611, 241 S.E.2d 485 (1978); *Spaulding v. Rich's, Inc.*, 144 Ga. App. 467, 241 S.E.2d 584 (1978); *Solomon Refrigeration, Inc. v. Lloyd*, 144 Ga. App. 542, 241 S.E.2d 642 (1978); *Lawrence v. Whittle*, 146 Ga. App. 686, 247 S.E.2d 212 (1978); *Cousins Mtg. & Equity v. Hamilton*, 147 Ga. App. 210, 248 S.E.2d 516 (1978); *Citizens & S. Nat'l Bank v. Williams*, 147 Ga. App. 205, 249 S.E.2d 289 (1978); *Rodes v. Citizens & S. Nat'l Bank*, 147 Ga. App. 782, 250 S.E.2d 513 (1978); *Scocca v. Wilt*, 243 Ga. 2, 252 S.E.2d 401 (1979); *Black v. Cotton States Ins. Co.*, 149 Ga. App. 71, 253 S.E.2d 565 (1979); *Peacock v. Cox*, 243 Ga. 261, 253 S.E.2d 728 (1979); *Citizens & S. Nat'l Bank v. Brown*, 149 Ga. App. 795, 256 S.E.2d 72 (1979); *Shield Ins. Co. v. Hutchins*, 149 Ga. App. 742, 256 S.E.2d 108 (1979); *Canup v. State*, 150 Ga. App. 794, 258 S.E.2d 907 (1979); *Petkas v. Piedmont-Linberg Corp.*, 151 Ga. App. 323, 259 S.E.2d 713 (1979); *McIntyre v. Gulf Oil Corp.*, 151 Ga. App. 855, 261 S.E.2d 766 (1979); *Price v. Ortiz*, 152 Ga. App. 651, 263 S.E.2d 527 (1979); *Hart v. State*, 153 Ga. App. 53, 264 S.E.2d 542 (1980); *Middleton v. Continental Dev. Corp.*, 153 Ga. App. 144, 264 S.E.2d 689 (1980); *Ford v. Liberty Loan Corp.*, 153 Ga. App. 309, 265 S.E.2d 113 (1980); *City of Atlanta v. Barton*, 153 Ga. App. 426, 265 S.E.2d 345 (1980); *Hubbard v. Farmers Bank*, 153 Ga. App. 497, 265 S.E.2d 845 (1980); *Westmoreland v. Beutell*, 153 Ga. App. 558, 266 S.E.2d 260 (1980); *Southeast Ceramics, Inc. v. Klem*, 154 Ga. App. 149, 267 S.E.2d 756 (1980); *In re Norris*, 154 Ga. App. 173, 267 S.E.2d 788 (1980); *Hendley v. Auto Owners Ins. Co.*, 154 Ga. App. 316, 268 S.E.2d 722 (1980); *Exum v. City of Valdosta*, 246 Ga. 169, 269 S.E.2d 441 (1980); *State v. Hart*, 246 Ga. 212, 271 S.E.2d 133 (1980); *Hawn v. Chastain*, 246 Ga. 723, 273 S.E.2d 135 (1980); *Knight v. First Nat'l Bank*, 156 Ga. App. 167, 274 S.E.2d 139 (1980); *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980); *Caldwell v. Elbert County School Dist.*, 247 Ga. 359, 276 S.E.2d 43 (1981); *Griswold v. Whetsell*, 157 Ga. App. 800, 278 S.E.2d 753 (1981); *Crosby v. Crosby*, 247 Ga. 792, 279 S.E.2d 712 (1981); *Colley v. Dillon*, 158 Ga. App. 416, 280 S.E.2d 425 (1981); *Mack v. Demming*, 248 Ga. 117, 281 S.E.2d 591 (1981); *Kirby v. Federated Mut. Implement & Hdwe. Ins. Co.*, 158 Ga. App. 778, 282 S.E.2d 139 (1981); *Horton v. Diamond Auto Parts & Recycling, Inc.*, 158 Ga. App. 750, 282 S.E.2d 207 (1981); *McKinnon v. McKinnon*, 158 Ga. App. 776, 282 S.E.2d 220 (1981); *Harkey v. State*, 159 Ga. App. 112, 282 S.E.2d 648 (1981); *Cartwright v. Alpha Transp. Serv., Inc.*, 159 Ga. App. 296, 283 S.E.2d 282 (1981); *Tobitt v. Tobitt*, 249 Ga. 245, 290 S.E.2d 49 (1982); *Newman v. James M. Vardaman & Co.*, 162 Ga. App. 878, 293 S.E.2d 462 (1982); *Collier v. Cosby*, Ga. App. , 293 S.E.2d 567 (1982); *Hooper v. State*, 164 Ga. App. 49, 296 S.E.2d 243 (1982); *Carson v. Morris*, 164 Ga. App. 732, 297 S.E.2d 513 (1982); *Johnson v. G.A.B. Bus. Servs., Inc.*, 165 Ga. App. 284, 300 S.E.2d 325 (1983); *Strickland v. State*, 165 Ga. App. 197, 300 S.E.2d 537 (1983); *Jernigan v. Carroll*, 167 Ga. App. 40, 306 S.E.2d 45 (1983); *Parks v. Atlanta Pub. Sch. Sys. Bd. of Educ.*, 168 Ga. App. 572, 309 S.E.2d 645 (1983); *Hill Aircraft & Leasing Corp. v. Planes, Inc.*, 169 Ga. App. 161, 312 S.E.2d 119 (1983); *Stone v. George F. Richardson, Inc.*, 169 Ga. App. 232, 312 S.E.2d 339 (1983); *Thomas v. Satterfield*, 169 Ga. App. 432, 313 S.E.2d 134 (1984); *State v. Waters*, 170 Ga. App. 505, 317 S.E.2d 614 (1984); *Hazelrig v. State*, 171 Ga. App. 97, 319 S.E.2d 32 (1984); *Miller v. Rosetti*, 171 Ga. App. 162, 319 S.E.2d 61 (1984); *Hudgins v. Bacon*, 171 Ga. App. 856, 321 S.E.2d 359 (1984); *Bowen v. Clayton County Hosp. Auth.*, 172 Ga. App. 204, 322 S.E.2d 528 (1984); *Graham v. State*, 172 Ga. App. 660, 324 S.E.2d 518 (1984); *Davis v. State*, 172 Ga. App. 710, 324 S.E.2d 559 (1984); *Savage v. Newsome*, 173 Ga. App. 271, 326 S.E.2d 5

(1985); *Sunn v. Mercury Marine*, 173 Ga. App. 593, 327 S.E.2d 562 (1985); *Bouldin v. Contran Corp.*, 173 Ga. App. 823, 328 S.E.2d 424 (1985); *Georgia Communications Corp. v. Horne*, 174 Ga. App. 69, 329 S.E.2d 192 (1985); *Ball v. Duncan*, 174 Ga. App. 341, 330 S.E.2d 160 (1985); *Franklin v. Shackelford*, 174 Ga. App. 520, 330 S.E.2d 449 (1985); *Haywood v. Wooden Peg, Inc.*, 174 Ga. App. 806, 331 S.E.2d 109 (1985); *Wicker v. Harrison*, 175 Ga. App. 68, 332 S.E.2d 366 (1985); *Law Offices of Johnson & Robinson v. Fortson*, 175 Ga. App. 706, 334 S.E.2d 33 (1985); *Carpets 'N Colors, Inc. v. Hollycraft Carpets, Inc.*, 177 Ga. App. 534, 339 S.E.2d 793 (1986); *Ehlers v. Schwall & Heuett*, 177 Ga. App. 548, 340 S.E.2d 207 (1986); *Belk-Hudson Co. v. Patterson*, 178 Ga. App. 16, 342 S.E.2d 2 (1986); *Daniel v. Leibolt*, 178 Ga. App. 186, 342 S.E.2d 334 (1986); *Chastain v. Baker*, 178 Ga. App. 649, 344 S.E.2d 472 (1986); *Dial v. Turner*, 179 Ga. App. 689, 347 S.E.2d 305 (1986); *McCallister v. Doe*, 181 Ga. App. 602, 353 S.E.2d 89 (1987); *Hanson v. Wilson*, 257 Ga. 5, 354 S.E.2d 126 (1987); *Kem Mfg. Corp. v. Sant*, 182 Ga. App. 135, 355 S.E.2d 437 (1987); *Richardson v. State*, 182 Ga. App. 827, 357 S.E.2d 162 (1987); *Staggs v. Wang*, 185 Ga. App. 310, 363 S.E.2d 808 (1987); *California Fed. Sav. & Loan Ass'n v. Hudson*, 185 Ga. App. 384, 364 S.E.2d 582 (1987); *Bruce Tile Co. v. Copelan*, 185 Ga. App. 469, 364 S.E.2d 603 (1988); *Watts v. State*, 185 Ga. App. 654, 365 S.E.2d 501 (1988); *Willis v. State*, 186 Ga. App. 197, 366 S.E.2d 778 (1988); *Booker v. Amdur*, 186 Ga. App. 276, 367 S.E.2d 94 (1988); *Palmer v. State*, 186 Ga. App. 892, 369 S.E.2d 38 (1988); *Computer Communications Specialists, Inc. v. Hall*, 188 Ga. App. 545, 373 S.E.2d 630 (1988); *Suddeth v. Forsyth County*, 258 Ga. 773, 373 S.E.2d 746 (1988); *Typo-Repro Servs., Inc. v. Bishop*, 188 Ga. App. 576, 373 S.E.2d 758 (1988); *Aldridge v. State*, 188 Ga. App. 729, 374 S.E.2d 223 (1988); *Seaton v. Aetna Cas. & Sur. Co.*, 189 Ga. App. 546, 376 S.E.2d 712 (1988); *Gerdes v. Dzielinski*, 189 Ga. App. 802, 377 S.E.2d 550 (1989); *Rivera v. Harris*, 259 Ga. 171, 377 S.E.2d 844 (1989); *Jarrett v. Butts*, 190 Ga. App. 703, 379 S.E.2d 583 (1989); *Rozier v. Davis/Smith Mtg. Corp.*, 193 Ga. App. 340, 387 S.E.2d 627 (1989); *Estfan v. Poole*, 193 Ga. App. 507, 388 S.E.2d 373 (1989); *State v. Dixon*, 194

Ga. App. 146, 390 S.E.2d 600 (1990); *City of Fairburn v. Cook*, 195 Ga. App. 265, 393 S.E.2d 70 (1990); *Val Preda Motors v. National Uniform Serv.*, 195 Ga. App. 443, 393 S.E.2d 728 (1990); *Miller v. Jeff Davis Apts., Ltd. II*, 196 Ga. App. 600, 396 S.E.2d 494 (1990); *Mooré v. Sinclair*, 196 Ga. App. 667, 396 S.E.2d 557 (1990); *Auld v. Weaver*, 196 Ga. App. 782, 397 S.E.2d 51 (1990); *Speir v. Nicholson*, 198 Ga. App. 383, 401 S.E.2d 588 (1991); *Merrill v. Eiberger*, 198 Ga. App. 806, 403 S.E.2d 91 (1991); *Royal v. Curry*, 199 Ga. App. 133, 404 S.E.2d 302 (1991); *Fabe v. Floyd*, 199 Ga. App. 322, 405 S.E.2d 265 (1991); *Slaughter v. State*, 199 Ga. App. 695, 405 S.E.2d 897 (1991); *Hall v. Bussey*, 200 Ga. App. 311, 408 S.E.2d 430 (1991); *Stephens v. State*, 201 Ga. App. 737, 412 S.E.2d 568 (1991); *Castleberry's Food Co. v. Smith*, 205 Ga. App. 859, 424 S.E.2d 33 (1992); *Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm'n*, 206 Ga. App. 315, 425 S.E.2d 340 (1992); *Wal-Mart Stores, Inc. v. Curry*, 206 Ga. App. 775, 426 S.E.2d 581 (1992); *Metropolitan Atlanta Rapid Transit Auth. v. Harrington*, 208 Ga. App. 736, 431 S.E.2d 730 (1993); *Hall v. World Omni Leasing, Inc.*, 209 Ga. App. 115, 433 S.E.2d 297 (1993); *Miller v. Ingles Mkt., Inc.*, 214 Ga. App. 817, 449 S.E.2d 166 (1994).

Failure to Perfect Service

Subsection (a) relates to procedure only and is therefore retrospective. *Horton v. Western Contracting Corp.*, 113 Ga. App. 613, 149 S.E.2d 542 (1966).

Failure of service which causes no harm is not ground for dismissal. — Where counsel for third-party defendant appears in court and argues merits of claim both orally and by brief, third-party defendant is not harmed by failure of service, and there is no ground to dismiss the appeal. *Petroleum Carrier Corp. v. Jones*, 127 Ga. App. 676, 194 S.E.2d 670 (1972).

Mandatory Dismissal of Appeal

1. In General

Dismissal of appeal mandatory only in instances provided in subsection (b). *Young v. Climatrol S.E. Distrib. Corp.*, 237 Ga. 53, 226 S.E.2d 737 (1976).

Mandatory Dismissal of Appeal (Cont'd)**2. Failure to Timely File Notice of Appeal**

Proper, timely filing of notice of appeal is an absolute requirement to confer appellate jurisdiction. *Hester v. State*, 242 Ga. 173, 249 S.E.2d 547 (1978).

Failure to file notice of appeal within time required is ground for dismissal. *Stanford v. Evans, Reed & Williams*, 221 Ga. 331, 145 S.E.2d 504 (1965); *Shepherd v. Epps*, 242 Ga. 322, 249 S.E.2d 33 (1978); *Littlejohn v. Tower Assocs.*, 163 Ga. App. 37, 293 S.E.2d 33 (1982).

Where notice of appeal was given more than 30 days after entry of judgment, judgment is not reviewable and appeal must be dismissed. *Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos.*, 116 Ga. App. 503, 157 S.E.2d 767 (1967).

If plaintiff wishes more than 30 days allowed by court order to deliberate on whether he should appeal dismissal of complaint, his remedy is to apply for extension of time as provided in § 5-6-39. Where appellant fails to exercise this provision of the law and appellee files a motion to dismiss the appeal under this section, the court has no alternative but to grant the motion and dismiss the appeal. *Hearn v. DeKalb County*, 118 Ga. App. 730, 165 S.E.2d 467 (1968).

Failure to file notice of appeal within time required, 30 days after entry of judgment complained of unless trial judge has extended the time, will result in its dismissal. *Associated Bldrs. Supply v. Georgia-Pacific Corp.*, 123 Ga. App. 222, 180 S.E.2d 273 (1971).

Failure to obtain extension before expiration of previously extended time. — Where plaintiff fails to obtain extension of time for expiration of previously extended time, and failed to file transcript of evidence within extended time, trial judge is authorized to enter dismissal of appeal. *Allen v. Seaboard C.L.R.R.*, 128 Ga. App. 391, 196 S.E.2d 878 (1973).

Filing notice one day late requires dismissal. — Where notice of appeal was filed only one day late, court was powerless to deny motion to dismiss filed by appellee. *Associated Bldrs. Supply v. Georgia-Pacific Corp.*, 123 Ga. App. 222, 180 S.E.2d 273 (1971).

Inexcusable and unreasonable delay. — Considering the fact that the mistaken designation in the notice of appeal could have been easily discovered if some attention had been paid to the matter, and that the earliest inquiry about the status of the appeal did not occur until several months after the notice of appeal had been filed, the trial court was duly authorized to find that plaintiff's delay was inexcusable and unreasonable. *Johnson v. Georgia Pub. Serv. Comm'n*, 209 Ga. App. 224, 433 S.E.2d 65 (1993).

Notice of appeal from judgment granting child custody must meet time requirement of § 5-6-35(g). — Section 5-6-35(g) read in conjunction with paragraph (b)(1) of this section, subjects notice of appeal from judgment granting child custody to dismissal if appellant fails to file said notice within ten days after order is issued granting application for such appeal. *Evans v. Davey*, 154 Ga. App. 269, 267 S.E.2d 875 (1980).

Notice of appeal from judgment in contempt of alimony judgment. — Section 5-6-35(g), read in conjunction with paragraph (b)(1) of this section, subjects notice of appeal from judgment in contempt of alimony judgment to dismissal if appellant fails to file said notice within ten days after order is issued granting application for such appeal. *Harris v. Harris*, 245 Ga. 75, 263 S.E.2d 113 (1980).

Attorney's stipulation regarding record on appeal does not affect running of time. — Fact that attorneys for the parties, after time limit for filing appeal entered into a stipulation as to what would constitute the record on appeal and filed the same, could have no effect on running of time within which notice of appeal must be filed. *Kokotis v. Lightsey*, 227 Ga. 800, 183 S.E.2d 383 (1971).

Reaffirmance of dismissal of counterclaims does not extend time for filing. — Where the time for filing the notice of appeal runs from the date of the voluntary dismissal of the appellees' counterclaims, the trial court is powerless to extend the time by entering a subsequent order reaffirming the dismissal of the complaint, even had it intended to do so. *Caswell v. Caswell*, 157 Ga. App. 710, 278 S.E.2d 452 (1981).

Delay in filing amendment to notice of appeal. — Although it is over two months later, after the expiration of the statutory appeal period, that appellant filed an

amendment to his original notice of appeal to correct the error he made, in light of this section and § 5-6-30, appellant is entitled to amend his notice of appeal to correct the name of the court to which the appeal is directed. *Griffin v. Johnson*, 157 Ga. App. 657, 278 S.E.2d 422 (1981).

Filing during unauthorized second extension. — Under § 5-6-39, trial court is authorized to grant only one extension of time for filing of notice of appeal; thus, filing of notice of appeal during unauthorized second extension comes too late to satisfy requirement of this section. *Hamby v. State*, 162 Ga. App. 348, 291 S.E.2d 724 (1982).

Insufficient motion for new trial does not extend filing date. — Alleged motion for new trial which did not contest factual issues or errors contributing to the verdict, but instead challenged only the trial court's legal conclusions and judgment was not a proper motion for new trial and did not entitle party an automatic stay in filing its notice of appeal. *Bank S. Mtg., Inc. v. Starr*, 208 Ga. App. 19, 429 S.E.2d 700 (1993).

3. Appeals From Nonfinal Judgments

Dismissal proper where judgment appealed is neither final nor certified for review under § 5-6-34(b). *Marsh v. Allgood*, 118 Ga. App. 773, 165 S.E.2d 479 (1968); *D.L.E. v. State*, 130 Ga. App. 724, 204 S.E.2d 481 (1974).

Fact that matter was heard at chambers. — Judgment which is not appealable under this section is not made appealable by § 5-6-33 merely because matter was heard at chambers. *Sheet Metal Workers Int'l Ass'n v. Carter*, 131 Ga. App. 176, 205 S.E.2d 715 (1974).

Appeal while motion for new trial is pending must be dismissed as premature. *Smith v. Smith*, 128 Ga. App. 29, 195 S.E.2d 269 (1973).

Appeal from "motion to compel settlement" was dismissed since the appeal was actually intended to be taken from an interlocutory order rather than from the "final outcome" of the case, and no amendment had been filed to correct this defect. *Martin v. Farrington*, 179 Ga. App. 227, 346 S.E.2d 5 (1986).

4. Moot Questions

Intermediate order appealed from becomes moot when subsequent final judgment

is entered. *Newman v. Steinberg*, 133 Ga. App. 824, 212 S.E.2d 479 (1975).

Supreme Court's affirmation of judgment denying habeas petition moots other appeals. — Where Supreme Court has affirmed judgment denying appellant's petition for writ of habeas corpus, appeal from same judgment, filed in Court of Appeals and transferred to Supreme Court, must be dismissed as moot. *Hubert v. State*, 244 Ga. 374, 260 S.E.2d 83 (1979).

Appeal from dissolution of restraining order dismissed where issue involved has become moot. — Where appellants bring action to enjoin appellees from conducting corporate stockholders meeting for purpose of electing directors, and trial court, after hearing, dissolves restraining order and dismisses complaint for failure to state a claim, and appellees then held stockholder's meeting, appeal of order dissolving restraining order and dismissing complaint must be dismissed pursuant to paragraph (b)(3). *Strickland v. Adams*, 231 Ga. 729, 204 S.E.2d 294 (1974).

Review of earlier judgment denying summary judgment. — After verdict and judgment, it is too late to review earlier judgment denying summary judgment, for that judgment becomes moot when the court reviews the evidence upon the trial of the case. *Rich v. Strickland*, 168 Ga. App. 107, 308 S.E.2d 206 (1983).

Dismissal by trial court. — Although this section does not specifically empower a trial court to dismiss an appeal for mootness, the Court of Appeals will affirm the trial court's dismissal of notices of appeal because the decision or judgment was not then appealable and hold that the trial court is empowered to dismiss an appeal where the questions presented have become moot. *Attwell v. Lane Co.*, 182 Ga. App. 813, 357 S.E.2d 142 (1987).

If case is moot, but error is capable of repetition, yet evades review, the appeal will be considered. *Chastain v. Baker*, 255 Ga. 432, 339 S.E.2d 241 (1986).

Ground for dismissal. — Mootness is a ground for dismissal of an appeal, and not a ground for the vacation of a judgment. *Harrell v. Huntington Assocs.*, 190 Ga. App. 421, 379 S.E.2d 194 (1989).

Appeal deemed moot and dismissed. See *Glenridge Unit Owners Ass'n v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987).

Mandatory Dismissal of Appeal (Cont'd)

4. Moot Questions (Cont'd)

A declaratory judgment action filed by the sole commissioner of a county in his official capacity to determine the commissioner's power vis-a-vis that of the county advisory board to enter into a lease-purchase contract for a county jail became moot when the voters provided the budgetary authority in the referendum. *Bond v. Parten*, 206 Ga. App. 88, 424 S.E.2d 353 (1992).

Dismissal was required of defendant's appeal of a consent agreement resolving a breach of contract in real estate where he had specifically agreed to the agreement and was thus not an aggrieved party and where his only enumerations of error concerned the grant of partial summary judgment and did not challenge the terms, validity or enforceability of the judgment entered pursuant to the agreement. *Riverdale Pools & Constr., Inc. v. Evans*, 210 Ga. App. 127, 435 S.E.2d 501 (1993).

Where county board of health had unilaterally lifted home confinement of defendant as part of treatment plan for his contagious tuberculosis, defendant's appeal from trial courts order of compliance with the board's plan was moot since reversal of the trial court would be of no practical benefit to defendant, and the action did not fall within the class of cases which would inevitably evade review. *Kappers v. DeKalb County Bd. of Health*, 214 Ga. App. 117, 446 S.E.2d 794 (1994).

Issue of illegal withholding of child moot.

— Where the parties had a common law marriage which resulted in the father forcefully keeping the child and filing for divorce and custody of the child, once the legitimation issue was resolved, the father had an equal right to the child's physical and legal custody and the issue of his illegal withholding of the child became moot. *Gregg v. Barnes*, 203 Ga. App. 549, 417 S.E.2d 206, cert. denied, 203 Ga. App. 906, 417 S.E.2d 206 (1992).

Insured's prevailing on merits rendered insurer's appeal moot. — An insurer that sought a declaratory judgment ruling on its obligations under a multi-peril insurance policy issued to a company whose employee was under the influence of alcohol at the time of a collision because of alcoholic beverages served to him by other employees during a company function had no claim because the insurer could not have suffered prejudice because the company had prevailed on the merits. *Southern Guar. Ins. Co. v. Viau*, 203 Ga. App. 806, 418 S.E.2d 608, cert. denied, 203 Ga. App. 907, 418 S.E.2d 608 (1992).

Suit regarding county contract moot by voter approval. — A declaratory judgment action filed by the sole commissioner of a county in his official capacity to determine the commissioner's power vis-a-vis that of the county advisory board to enter into a lease-purchase contract for a county jail became moot when the voters provided the budgetary authority in the referendum. *Bond v. Parten*, 206 Ga. App. 88, 424 S.E.2d 353 (1992).

Delay in Filing Transcript

1. In General

Time not jurisdictional. — Time provided for filing transcript of evidence and proceedings in appeals is not jurisdictional. *Taylor v. Thompson*, 152 Ga. App. 547, 263 S.E.2d 487 (1979).

Failure to file a transcript in accordance with § 5-6-42 is not jurisdictional, and is not a ground for dismissal unless accompanied by finding of unreasonableness and lack of excuse, as required by subsection (c) of this section. *Young v. Jones*, 147 Ga. App. 65, 248 S.E.2d 49 (1978).

In considering question of unreasonable delay, it should be remembered that the time provided for filing transcript or record is not jurisdictional, but merely a means of avoiding unreasonable delay so that the case can be presented on earliest possible calendar in appellate court. *Young v. Climatrol S.E. Distrib. Corp.*, 237 Ga. 53, 226 S.E.2d 737 (1976); *Gilland v. Leathers*, 141 Ga. App. 680, 234 S.E.2d 338 (1977); *Ray v. Williams*, 144 Ga. App. 155, 240 S.E.2d 577 (1977); *Compher v. Georgia Waste Sys.*, 155 Ga. App. 819, 273 S.E.2d 200 (1980).

Time provided for filing transcript or record is not jurisdictional, but merely a means of avoiding unreasonable delay so that case can be presented on earliest possible calendar in appellate courts. *Green v. Weaver*, 161 Ga. App. 295, 291 S.E.2d 247 (1982).

Failure of an appellant to cause the transcript to be filed in accordance with the time limitations set forth in § 5-6-42 is not itself a ground for dismissal of the appeal, absent a judicial determination that the resulting delay was both unreasonable and inexcusable. *Llano v. DeKalb County*, 174 Ga. App. 693, 331 S.E.2d 36 (1985); *Barmore v. Himebaugh*, 205 Ga. App. 381, 422 S.E.2d 255 (1992).

Failure to file transcript is no longer ground for dismissal of appeals by appellate courts. *Jackson v. Fincher*, 128 Ga. App. 148, 195 S.E.2d 762 (1973).

Court of Appeals lacks authority to dismiss any appeal because of failure of any party to cause transcript of evidence and proceedings to be filed within time provided by law or order of court. *Reed v. Arrington-Blount Ford, Inc.*, 148 Ga. App. 595, 252 S.E.2d 13 (1979); *Campbell v. Crumpton*, 173 Ga. App. 488, 326 S.E.2d 845 (1985); *State v. Jackson*, 188 Ga. App. 259, 372 S.E.2d 823 (1988).

Distinction between appellate courts' right to dismiss appeals and trial courts' right. — See *Buffalo Holding Co. v. Shores*, 124 Ga. App. 868, 186 S.E.2d 339 (1971), appeal dismissed, 228 Ga. 854, 188 S.E.2d 790 (1972).

Subsection (c) does not affect appellate courts' constitutional responsibility. — Provision of subsection (c) that trial courts, rather than appellate courts, may dismiss appeals for failure of party to file transcript within proper time, does not change responsibility of appellate court under Ga. Const. 1976, Art. VI, Sec. II, Para. V (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II), and appellate court will dismiss a state appeal. *Cox Enters., Inc. v. Southland, Inc.*, 226 Ga. 794, 177 S.E.2d 653 (1970), cert. denied, 401 U.S. 993, 91 S. Ct. 1231, 28 L. Ed. 2d 531 (1971).

Effect of Ga. L. 1968, p. 1072, §§ 2, 3 on subsection (c) was to permit disposition of case in trial court. *Richardson v. Nu-Way Cleaners & Laundry*, 121 Ga. App. 425, 174 S.E.2d 202 (1970).

Only way to raise question of late filing of transcript is under this section. *Gilman Paper Co. v. James*, 235 Ga. 348, 219 S.E.2d 447 (1975).

Dismissal for delay in filing transcript requires exercise of discretion. — Subsec-

tion (c) which empowers trial courts to dismiss appeals for delay in filing transcript or transmitting record, requires exercise of discretion by the judge. *Strother v. C. & S. Nat'l Bank*, 147 Ga. App. 140, 248 S.E.2d 204 (1978).

Criteria for dismissal. — Subsection (c) sets forth three criteria for dismissal of the appeal for failure to timely file a transcript: (1) unreasonable delay, which was (2) inexcusable and (3) "caused by such party." *Department of Human Resources v. Patillo*, 196 Ga. App. 778, 397 S.E.2d 47 (1990).

Provisions governing power of court to dismiss appeal for late filing. — See *South-eastern Plumbing Supply Co. v. Lee*, 232 Ga. 626, 208 S.E.2d 449 (1974).

Where appellant fails to present adequate record for review. — Subsection (c) does not prohibit affirmance where appellant fails to present appellate court with record sufficient to enable it to determine whether trial court has committed reversible error. *Brown v. Frachiseur*, 247 Ga. 463, 277 S.E.2d 16 (1981).

Absent transcript, trial court findings assumed authorized. — Where defendant has not provided appellate court with transcript of trial, it must assume findings of trial court were authorized by evidence. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

No transcript to include as part of record. — There was no abuse of discretion in the trial court's dismissal of the appeal where the appeal was delayed because of appellant's designation of the transcript to be included as part of the record when there was no transcript and appellant's counsel made no effort to expedite the appeal since filing the notice of appeal. *Teston v. Mills*, 203 Ga. App. 20, 416 S.E.2d 133 (1992).

Affidavits of indigency precluded dismissal. — Although plaintiff's delay in following up on the transmission of the record was unreasonable and inexcusable, the language of this section and § 5-6-30 mandated that the appellate practice provisions be liberally construed. Accordingly, the trial court properly denied defendant's motion to dismiss where plaintiffs had filed affidavits of indigency. *Carter v. Fulton-DeKalb County Hosp. Auth.*, 209 Ga. App. 384, 433 S.E.2d 433 (1993).

Delay in Filing Transcript (Cont'd)**2. Unreasonable, Inexcusable Delay**

Cause for delay in processing of appeal is fact issue for determination in trial court. *Gilman Paper Co. v. James*, 235 Ga. 348, 219 S.E.2d 447 (1975); *ITT Indus. Credit Co. v. Burnham*, 152 Ga. App. 641, 263 S.E.2d 482 (1979).

Whether there has been unreasonable delay in filing transcript is fact issue for trial court determination. *Johnson v. Clements*, 135 Ga. App. 495, 218 S.E.2d 109 (1975).

Finding of unreasonable and inexcusable delay required for dismissal. — Failure to timely file transcript is not basis for dismissal of appeal unless trial court finds that the delay was unreasonable, and that the unreasonable delay was inexcusable. *Patterson v. Professional Resources, Inc.*, 242 Ga. 459, 249 S.E.2d 248 (1978); *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980); *White v. Olderman Realty & Dev. Co.*, 163 Ga. App. 57, 293 S.E.2d 726 (1982).

Provision authorizing trial court to dismiss appeal for failure to make timely filing of transcript specifies that two elements must be present: One is that delay is unreasonable and the other is that the unreasonable delay is inexcusable. *Young v. Climatrol S.E. Distrib. Corp.*, 237 Ga. 53, 226 S.E.2d 737 (1976); *ITT Indus. Credit Co. v. Carpet Factory, Inc.*, 140 Ga. App. 204, 230 S.E.2d 354 (1976), appeal dismissed, 143 Ga. App. 218, 237 S.E.2d 687 (1977); *Young v. Jones*, 147 Ga. App. 65, 248 S.E.2d 49 (1978); *Smith v. Georgia Power Co.*, 183 Ga. App. 295, 358 S.E.2d 879 (1987).

Section gives discretion to trial court to dismiss appeal if delay in transmitting record is both unreasonable and inexcusable. *Corbin v. First Nat'l Bank*, 151 Ga. App. 33, 258 S.E.2d 697 (1979).

Where there has been unreasonable delay in filing of transcript and it is shown that delay was inexcusable and was caused by appellant, trial court may order appeal dismissed, and in such cases, it is error to dismiss appeal based upon jurisdictional grounds and to fail to determine whether or not delay, if any, was "unreasonable" and "inexcusable." *Green v. Weaver*, 161 Ga. App. 295, 291 S.E.2d 247 (1982).

The failure to apply for an extension of

time within which to file the transcript does not automatically convert a subsequent delay into one which fits all of the conditions necessary to vest the trial court with the discretion to dismiss the appeal. The trial court has discretion to dismiss an appeal for failure to timely file a transcript only if (1) the delay in filing was unreasonable; (2) the failure to timely file was inexcusable in that it was caused by some act of the party responsible for filing the transcript. *Baker v. Southern Ry.*, 260 Ga. 115, 390 S.E.2d 576 (1990).

The trial court did not abuse its discretion in finding that the delay in timely filing a transcript was caused by plaintiffs and was inexcusable, given plaintiffs undisputed failure to seek another extension of the deadline and the trial court's authorization to conclude that they had failed even to order the additional portions of transcript until the deadline had passed. *Van Diviere v. Delta Airlines*, 204 Ga. App. 573, 420 S.E.2d 27, cert. denied, 204 Ga. App. 922, 420 S.E.2d 27 (1992).

There was no abuse of discretion in the trial court's dismissal of the notice of appeal from the directed verdict on a counterclaim, on the grounds that the three-month delay was inexcusable, unreasonable, and caused by the party's failure to pay the required deposit for preparation of the transcript. *Crocker v. Stevens*, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, U.S. , 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994).

The trial court's finding that appellants had not been diligent in determining that there would be a delay was not supported by the record which revealed that appellants' counsel ordered the transcript in a timely manner, made timely payment, and made reasonable inquiry as to the status of its preparation and that the court reporter knew she needed to complete the transcript as soon as possible, that she was aware of the 30-day deadline, and that the earliest she could complete it was the end of July. *Welch v. Welch*, 212 Ga. App. 667, 442 S.E.2d 857 (1994).

Discretion of court. — In passing upon issues of unreasonableness and lack of excuse, trial court has discretion. *Ray v. Williams*, 144 Ga. App. 155, 240 S.E.2d 577 (1977).

Determination that delay is unreasonable and inexcusable is within discretion of trial

court. *ITT Indus. Credit Co. v. Burnham*, 152 Ga. App. 641, 263 S.E.2d 482 (1979).

Trial court's determination subject to review. — In passing upon whether delay was unreasonable and inexcusable, trial court has legal discretion which is subject to review in appellate courts. *Young v. Climatrol S.E. Distrib. Corp.*, 237 Ga. 53, 226 S.E.2d 737 (1976); *Ray v. Williams*, 144 Ga. App. 155, 240 S.E.2d 577 (1977); *Corbin v. First Nat'l Bank*, 151 Ga. App. 33, 258 S.E.2d 697 (1979); *Galletta v. Hillcrest Abbey W., Inc.*, 185 Ga. App. 20, 363 S.E.2d 265 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 265 (1988); *Smith v. Georgia Power Co.*, 183 Ga. App. 295, 358 S.E.2d 879 (1987); *Lloyd v. Hodge*, 191 Ga. App. 355, 381 S.E.2d 540 (1989).

Losing party has right to appeal trial court's ruling on question of late filing of transcript. *Gilman Paper Co. v. James*, 235 Ga. 348, 219 S.E. 447 (1975).

Specific findings of unreasonable and unexcusable delay. — Fact that trial court does not render specific findings of unreasonable and unexcusable delay does not prevent trial court judge from dismissing appeal on these grounds pursuant to this section. *Karlsberg v. Hoover*, 142 Ga. App. 590, 236 S.E.2d 520, cert. dismissed, 240 Ga. 295, 240 S.E.2d 553 (1977).

While this section sets forth conditions upon which trial court may dismiss appeal for delay, it does not by its terms require court to make formal recitation of those conditions in its order. *Lee v. White Truck Lines*, 143 Ga. App. 94, 238 S.E.2d 120 (1977).

Standard of review. — Trial court's finding on reasonable delay will be reversed only for abuse of discretion. *DuBois v. DuBois*, 240 Ga. 314, 240 S.E.2d 706 (1977); *Patterson v. Professional Resources, Inc.*, 242 Ga. 459, 249 S.E.2d 248 (1978); *Ballenger Corp. v. Dresco Mechanical Contractors*, 156 Ga. App. 425, 274 S.E.2d 786 (1980); *Hunt v. Lee*, 190 Ga. App. 403, 379 S.E.2d 215 (1989).

In reviewing a finding of unreasonable and inexcusable delay in filing a transcript, this court will not disturb the lower court's finding absent an abuse of discretion. *Teston v. Mills*, 203 Ga. App. 20, 416 S.E.2d 133 (1992).

Trial judge's failure to exercise discretion will result in reversal. — Where trial judge

under subsection (c) fails to exercise discretion, resting his decision instead solely upon a point of law, a reversal will result. *Strother v. C. & S. Nat'l Bank*, 147 Ga. App. 140, 248 S.E.2d 204 (1978).

Where delay is attributable to clerk of court rather than to counsel, the Constitution forbids dismissal of the case. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Where delay in filing of transcript does not delay docketing and hearing dismissal is not warranted. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

The trial court's finding that the delay in filing the transcript in a timely fashion was unreasonable so as to warrant dismissal was an abuse of discretion and the delay in filing did not delay transmission of the record to the Court of Appeals. *Sellers v. Nodvin*, 262 Ga. 205, 415 S.E.2d 908 (1992).

Party must request extension of time though initial delay not his fault. — Fact that initial delay in preparation of transcript may not have been fault of defendant does not excuse filing delay, in absence of proper request by defendant for extension of time. *Dampier v. First Bank & Trust Co.*, 153 Ga. App. 756, 266 S.E.2d 539 (1980).

The fact that an unreasonable delay in the preparation of the transcript is not the fault of the appellant does not excuse a filing delay, in the absence of a proper request by the appellant for an extension of time. This being so, the trial court is authorized to dismiss the appeal. *In re G.W.H.*, 168 Ga. App. 845, 310 S.E.2d 573 (1983).

Dismissal not required where appellant does not cause delay and judge denies extension. — To construe § 5-6-39 as requiring dismissal where appellant did not cause delay and trial judge declined to grant requested extension would shut off right of appeal, and would thus violate the constitutional mandate of Ga. Const. 1976, Art. VI, Sec. II, Para. V (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II). Such a construction would also be contrary to the legislative intent expressed in subsection (c) of this section and § 5-6-30 of this article as to decision upon merits. *Elliott v. Leathers*, 223 Ga. 497, 156 S.E.2d 440 (1967).

Delay in Filing Transcript (Cont'd)
2. Unreasonable, Inexcusable
Delay (Cont'd)

Grant of extension of time for filing transcript does not excuse unreasonable delay in filing. *Johnson v. Clements*, 135 Ga. App. 495, 218 S.E.2d 109 (1975).

Six-day delay not unreasonable. — Where the transcript was completed by the court reporter, who failed to file it in the clerk's office, a six-day delay did not amount to an unreasonable delay in filing, nor was it inexcusable. *Wagner v. Howell*, 257 Ga. 801, 363 S.E.2d 759 (1988).

Eight-month delay held unreasonable. — Where there was an eight-month delay in the filing of the transcript, failure to request an extension of time, and absence of any articulated excuse for the failure, the court did not abuse its discretion in finding the delay to be unreasonable and inexcusable. *Fuller v. Mayor & Aldermen*, 193 Ga. App. 716, 389 S.E.2d 7 (1989), cert. denied, 496 U.S. 906, 110 S. Ct. 2589, 110 L. Ed. 2d 270 (1990).

151-day delay unreasonable. — Where the record showed a 151-day delay between when the transcript was required to be filed, and when it was ultimately filed, which was caused by appellants' failure to order the transcript, subsection (f) of this section was inapplicable and the delay was unreasonable. *Burton v. Hamilton*, 204 Ga. App. 18, 418 S.E.2d 398 (1992).

Misunderstanding clerk's directions not inexcusable. — Where wife's attorney offered under oath an explanation for the delay in filing the transcript, claiming he misunderstood the directions given to him by an unidentified deputy court clerk, the explanation provided by the attorney as the reason for his delay, could not be said to be inexcusable as a matter of law. *Hammontree v. Hammontree*, 186 Ga. App. 819, 368 S.E.2d 576 (1988).

Remand for fact determination. — Where the trial court never made the requisite fact determination regarding whether the delay in filing the transcript was unreasonable, inexcusable, and caused by plaintiff, the appropriate course of action was to remand the case to the trial court to make that determination and rule on defendant's motion to dismiss. *Beavers v. Gilstrap*, 210 Ga. App. 46, 435 S.E.2d 267 (1993).

Delay held unreasonable. — See *A. Roberts Corp. v. Roberts*, 207 Ga. App. 663, 428 S.E.2d 671 (1993).

Delay Occasioned by Nonpayment of Costs

1. In General

Rebuttable presumption of delivery of notice. — A clerk's affidavit is sufficient evidence to establish the elements necessary to create a rebuttable presumption that the notice of the amount of costs was delivered to counsel, and to create a duty to show it was not wilfully refused. *Crenshaw v. Georgia Underwriting Ass'n*, 202 Ga. App. 610, 414 S.E.2d 915 (1992).

Issue of failure to pay costs cannot be raised for first time on appeal. — Where no issue was raised in trial court as to whether notice of appeal should be dismissed for unreasonable and inexcusable delay in transmitting record due to failure to pay costs; the issue may not be raised for first time on appeal. *Jones v. Monroe Nursing Home, Inc.*, 149 Ga. App. 582, 254 S.E.2d 902 (1979).

Appellant entitled to opportunity for hearing on motion to dismiss for delay in paying costs. *Scocca v. Wilt*, 241 Ga. 334, 245 S.E.2d 295 (1978).

Plaintiffs required to pay calculated costs. — The notice received by plaintiffs contained calculated, not estimated costs, thus requiring the plaintiffs to pay where the state court appeals clerk testified at the hearing on the motion to dismiss that costs are determined by multiplying the number of pages to be photocopied by the cost per page and then adding a small fee (\$5.50) for recording and certifying the record. *CRA Transp., Inc. v. Rolls Royce Motors, Inc.*, 204 Ga. App. 825, 420 S.E.2d 757, cert. denied, 204 Ga. App. 921, 420 S.E.2d 757 (1992).

Transmittal of record prior to ruling on motion to dismiss appeal. — Where, whether transmitted erroneously or not, the record and transcript in an appeal was sent to the Court of Appeals prior to any ruling by the trial court in regard to appellee's motion to dismiss the appeal, even assuming that the trial court's dismissal of the appeal was premised not only upon the failure to pay costs timely but also upon the basis that such failure resulted in unreasonable delay in the transmission of the record to this

court and that the delay was inexcusable as required under § 5-6-48(c), the order of dismissal is a nullity. Pursuant to Court of Appeals Rule 47, as amended effective March 1, 1985, the trial court was relieved of its jurisdiction to consider objections to records or transcripts when there was no ruling upon such objection prior to transmittal of the record. *Turner v. Taylor*, 179 Ga. App. 574, 346 S.E.2d 920 (1986).

Nonprejudicial delay. — Where the delay in paying the costs did not appreciably lengthen the litigation or prejudice the opponents, there was no abuse of discretion in the trial court's denial of motion to dismiss. *Jim Walter Homes, Inc. v. Strickland*, 185 Ga. App. 306, 363 S.E.2d 834 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 834 (1988).

Refusal to accept letter is equivalent of receipt. — A refusal to accept a letter delivered to the proper address with adequate postage is the equivalent of receipt of notice. *Crenshaw v. Georgia Underwriting Ass'n*, 202 Ga. App. 610, 414 S.E.2d 915 (1992).

2. Unreasonable, Inexcusable Delay

Failure to pay costs which does not occasion delay. — Where record in lower court is forwarded prior to payment of costs in that court, and failure to pay costs has not worked a delay in appellate court, there is no ground for dismissal. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Failure to pay costs where record otherwise properly transmitted. — Failure to pay court costs to clerk of court below before record is transmitted to appellate court will not result in dismissal of case where record is otherwise properly transmitted (albeit inadvertently). *Elliott v. Walton*, 136 Ga. App. 211, 220 S.E.2d 696 (1975).

Unreasonable delay warrants dismissal. — Where there has been unreasonable delay and it is shown that delay was inexcusable and was caused by failure of party to pay costs in trial court or file pauper's affidavit, trial court may order appeal dismissed. *Brookshire v. J.P. Stevens Co.*, 133 Ga. App. 97, 210 S.E.2d 46 (1974).

Hearing required. — The trial court must conduct a hearing or otherwise consider evidence to make a determination as to

whether under the circumstances the delay was unreasonable and, if so, whether it was inexcusable. *Crenshaw v. Georgia Underwriting Ass'n*, 202 Ga. App. 610, 414 S.E.2d 915 (1992).

Delay of 45 days in paying costs is in fact unreasonable and inexcusable. — Where total elapsed time between filing of notice of appeal and mailing of record was 70 days, 25 of which were chargeable to clerk and additional 45 to plaintiff's tardiness in paying costs, such delay is in fact unreasonable and inexcusable, nothing further appearing. *Jones v. State*, 123 Ga. App. 672, 182 S.E.2d 190 (1971).

Determination by trial court was not an abuse of discretion where all arguments presented were fully considered and the reasons for the delay were found neither reasonable nor excusable. *McDonald v. Garden Servs., Inc.*, 163 Ga. App. 851, 295 S.E.2d 551 (1982), cert. vacated, 251 Ga. 337, 304 S.E.2d 914 (1983).

Error by inexperienced employee of counsel as giving rise to delay. — The trial court did not abuse its discretion in denying the motion to dismiss the appeal due to an alleged unreasonable and inexcusable delay in paying the costs, which had not been paid more promptly, according to the appellant, due to a mistake by an inexperienced former employee, and due to lack of knowledge by counsel of the receipt by his office of the bill. *ITT Terryphone Corp. v. Modems Plus, Inc.*, 171 Ga. App. 710, 320 S.E.2d 784 (1984).

Delays of over 30 days have been suggested as being prima facie unreasonable and inexcusable. *Continental Inv. Corp. v. Cherry*, 124 Ga. App. 863, 186 S.E.2d 301 (1971); *Bouldin v. Parker*, 173 Ga. App. 526, 327 S.E.2d 760 (1985); *Hatfield v. Great Am. Mgt. & Inv., Inc.*, 190 Ga. App. 534, 379 S.E.2d 544 (1989).

A delay of more than 30 days in paying costs is prima facie unreasonable and inexcusable. However, the inference arising from such a delay is not conclusive and may be rebutted by evidence presented by an opposing party. *Leonard v. Ognio*, 201 Ga. App. 260, 410 S.E.2d 814 (1991).

Trial court's denial of plaintiff's motion to dismiss defendants' notice of appeal was an abuse of discretion, where there was a delay of more than 30 days in the payment of costs and no evidence as to why the delay oc-

Delay Occasioned by Nonpayment of Costs (Cont'd)

2. Unreasonable, Inexcusable Delay (Cont'd)

curred. *Leonard v. Ognio*, 201 Ga. App. 260, 410 S.E.2d 814 (1991).

Delay of 106 days found unreasonable. — Appellant's 106 day delay in paying costs was unreasonable and warranted dismissal. *Roach v. Boyce, Thompson & O'Brien*, 201 Ga. App. 212, 410 S.E.2d 748, cert. denied, 201 Ga. App. 904, 410 S.E.2d 748 (1991).

Considerations in determining reasonableness of delay of less than 30 days. — See *Continental Inv. Corp. v. Cherry*, 124 Ga. App. 863, 186 S.E.2d 301 (1971).

Counsel's inability to contact client and latter's delay in obtaining money for costs. — Where counsel for appellant states that delay in transmitting record to appellate court was caused by inability to contact client and time client took to obtain money to pay costs, appellate court cannot say that judge of superior court erred in dismissing appeal because of delay in forwarding record. *Williford v. General Ins. Co. of America*, 119 Ga. App. 1, 165 S.E.2d 924 (1969).

Amendment of Record

Record before the court is what appellate courts should rely on in passing on the merits of an appeal from a final judgment. *Interstate Fin. Corp. v. Appel*, 233 Ga. 649, 212 S.E.2d 821 (1975).

Supplementation of record. — If record before it is insufficient to pass upon merits, appellate court should require supplementation if necessary additions are available in trial court. *Interstate Fin. Corp. v. Appel*, 233 Ga. 649, 212 S.E.2d 821 (1975); *Scott v. Allstate Ins. Co.*, 190 Ga. App. 135, 378 S.E.2d 332 (1989).

Appellate court should allow parties to send up necessary documents rather than dismiss appeal. — Ends of justice are better served by allowing appellant or appellee to send up through clerk of trial court additional available documents or transcripts that will enable appellate courts to render decisions on merits than by dismissing the appeal for failure to provide documents. *Interstate Fin. Corp. v. Appel*, 233 Ga. 649, 212 S.E.2d 821 (1975).

Where omission of proper party was inadvertent. — In order to add additional proper party by amendment to notice of appeal under subsection (d), original omission of that party must have been an inadvertent error. *Hamilton Mtg. Corp. v. Bowles*, 142 Ga. App. 882, 237 S.E.2d 198 (1977).

Failure to perfect record. — Appellant, seeking an interlocutory review of a denial of a motion to dismiss, is not entitled, after the reviewing court has rendered its decision, to supplement its record on appeal in order to correct an omission resulting from the failure of counsel to perfect the record. *Consolidated Government v. Williams*, 184 Ga. App. 815, 363 S.E.2d 20, cert. denied, 184 Ga. App. 909, 363 S.E.2d 20 (1987).

Motion erroneously brought under § 5-6-41(f). — Once the appellate court renders its decision, § 5-6-48, under which the action originates in the appellate court, becomes the exclusive method for supplementing the record. Therefore, the appellate court's refusal to entertain, on motion for rehearing under § 5-6-41(f), under which the action originates in the trial court, the supplementation of the record was not error. However, in holding that what the defendant wore at trial, not shown in the record other than a reference to "prison garb," was new evidence and not subject to § 5-6-41(f), the appellate court erred. *State v. Pike*, 253 Ga. 304, 320 S.E.2d 355 (1984).

Notice of Appeal

Trial court does not lose complete jurisdiction by mere filing of notice of appeal. *Allied Prods., Inc. v. Peterson*, 233 Ga. 266, 211 S.E.2d 123 (1974).

The trial court does not lose complete jurisdiction in a case by the mere filing of a notice of appeal. *Hooper v. Southern Bell Tel. & Tel. Co.*, 195 Ga. App. 629, 394 S.E.2d 798 (1990).

The plain language and import of subsection (c) is that the filing of the notice of appeal does not divest the trial court of authority to consider dismissal of an appeal. *Hooper v. Southern Bell Tel. & Tel. Co.*, 195 Ga. App. 629, 394 S.E.2d 798 (1990).

Plaintiff's request for an extension on the basis of inability to pay costs, filed a month after receiving the bill, was untimely, and his belated payment of costs did not eliminate the court's authority to determine the rea-

sonableness and excusability of the payment delay, in ruling on dismissal. *Hooper v. Southern Bell Tel. & Tel. Co.*, 195 Ga. App. 629, 394 S.E.2d 798 (1990).

Where appealable judgment or order not included in notice. — It is duty of appellate courts to inquire into their own jurisdiction and dismiss the appeal where an appealable judgment or order is not included in the notice of appeal. *Interstate Fire Ins. Co. v. Chattam*, 222 Ga. 436, 150 S.E.2d 618, answer conformed to, 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Notice of appeal must specify an appealable judgment from which the appeal is entered, absent which the appeal must be dismissed. *Parish v. Georgia R.R. Bank & Trust Co.*, 115 Ga. App. 540, 154 S.E.2d 750 (1967).

Where notice of appeal fails to specify any judgment whatever, appeal must be dismissed. *Ballew v. State*, 225 Ga. 547, 170 S.E.2d 242 (1969).

Notice of appeal from jury verdict neither constitutes substantial compliance nor is amendable. — Where notice of appeal states that it is an appeal from a jury verdict, this section does not authorize appellate courts to cause notice of appeal to be perfected by requiring appeal to be amended to show appeal from judgment or to treat appeal from verdict as a substantial compliance with the statute. *Interstate Fire Ins. Co. v. Chattam*, 222 Ga. 436, 150 S.E.2d 618, answer conformed to, 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Fact that notice of appeal is improperly styled is not ground for dismissal. *Bagwell v. Henson*, 124 Ga. App. 92, 183 S.E.2d 485 (1971).

Incorrect designation of date of judgment does not render notice of appeal insufficient. *Bagwell v. Henson*, 124 Ga. App. 92, 183 S.E.2d 485 (1971).

Failure to state offense and punishment prescribed. — Deficiencies in defendant's notice of appeal, which did not state the offense and punishment prescribed, did not justify dismissal of the appeal where the notice did provide the specific case number, style, court and date on which the final judgment appealed from was entered and information contained in the notice, considered in conjunction with even a cursory inspection of the record, would make clear

the judgment appealed from, as well as the offense and punishment. *Brumby v. State*, 264 Ga. 215, 443 S.E.2d 613 (1994).

Technical error in referring to judgment n.o.v. as directed verdict. — Where trial court's ruling was made after a jury verdict for appellant, appellee is technically correct in denominating it as a judgment notwithstanding verdict, rather than a directed verdict. Nevertheless, appellant's misnomer did not require dismissal. *Sanders v. Looney*, 247 Ga. 379, 276 S.E.2d 569 (1981).

Failure to specify whether transcript will be included on appeal not ground for dismissal under section. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Notice of appeal may be amended. — In view of this statute's plain language, a notice of appeal may be amended. *Blackwell v. Cantrell*, 169 Ga. App. 795, 315 S.E.2d 29 (1984).

Failure to state grounds of appeal. — A notice of appeal which fails to specifically state the grounds of appeal, can be amended prior to judgment to perfect the appeal. *Spencer v. Lamar County Bd. of Tax Assessors*, 202 Ga. App. 742, 415 S.E.2d 332 (1992).

Amendments to notices of appeal to superior courts from administrative boards. — Since policy of law is in favor of deciding tax appeals on merits, even at expense of procedural technicalities, subsection (d) which allows amendments of notice of appeal from superior courts, also applies to notices of appeal to superior courts from administrative boards. *Mundy v. Clayton County Tax Assessors*, 146 Ga. App. 473, 246 S.E.2d 479 (1978).

Error in stating prior action from which appeal sought. — As it was clear that the appellant was appealing the entry of judgment in favor of the appellee, the notice of appeal was deemed filed within 30 days of the entry of judgment, despite the fact that the notice erroneously stated that it was from the prior directed verdict. *Horton v. Allstate Ins. Co.*, 171 Ga. App. 707, 320 S.E.2d 761 (1984), overruled on other grounds, *Carter v. Banks*, 254 Ga. 550, 330 S.E.2d 866 (1985).

Failure to include dismissal of city as defendant. — Because it is clear from the

Notice of Appeal (Cont'd)

enumerations of error that plaintiffs sought to appeal from the trial court's dismissal of the city as a defendant, as well as the grant of summary judgment as to other defendants, the failure to include the dismissal of the city in the notice of appeal does not prevent the court's review of the matter. *Rea v. Bunce*, 179 Ga. App. 628, 347 S.E.2d 676 (1986), overruled on other grounds, *Martin v. Georgia Department of Pub. Safety*, 257 Ga. 300, 357 S.E.2d 569 (1987), cert. denied, 484 U.S. 998, 108 S. Ct. 685, 98 L. Ed. 2d 638 (1988).

Application Generally

Where court can ascertain what judgment is appealed from. — Where from examination of notice of appeal, record, and enumeration of errors, the court is able to determine what judgment is appealed from, a motion to dismiss appeal is without merit. *Franklin v. Sea Island Bank*, 120 Ga. App. 654, 171 S.E.2d 866 (1969).

Patently inadvertent misdescription of judgment appealed from will not cause dismissal of appeal where examination of whole record clearly reveals identity of judgment from which appellant intended to take appeal. *Eubank v. Barber-Colman Co.*, 115 Ga. App. 217, 154 S.E.2d 638 (1967).

Where claim is clear, although formal enumeration and brief not filed. — Where claim is clear and apparent from face of pro se pleading and notice of appeal, motion to dismiss for failure to file formal enumeration of errors and brief will be denied. *Parris v. State*, 232 Ga. 687, 208 S.E.2d 493 (1974).

Inclusion of motion in enumeration of errors and not in notice of appeal. — Since denial of motion for summary judgment was included in enumeration of errors, requirements of law were adequately met despite failure to include denial of motion in notice of appeal. *Southeast Ceramics, Inc. v. Klem*, 246 Ga. 294, 271 S.E.2d 199 (1980).

Failure to include jurisdictional statement in enumeration of errors. — Failure of the enumeration of errors to contain statement of reasons why Court of Appeals and not Supreme Court has jurisdiction will not result in dismissal of case. *Kitchens v. Hall*, 116 Ga. App. 41, 156 S.E.2d 920 (1967).

Appellant cannot by brief substitute new and different enumeration for one actually

and clearly made. *Daniel v. State*, 118 Ga. App. 370, 163 S.E.2d 863 (1968), cert. denied, 394 U.S. 919, 89 S. Ct. 1193, 22 L. Ed. 2d 453 (1969).

Mere failure to argue some errors insisted upon in brief. — Where there is a general insistence in brief of counsel for defendant in criminal case upon all of the errors assigned in his petition for certiorari, upon the overruling of which he assigns error in Court of Appeals, a mere failure to argue some of the assignments of error does not constitute abandonment of those issues. *Cole v. State*, 86 Ga. App. 770, 72 S.E.2d 537 (1952) (decided under former Code 1933, § 6-1601).

Independent motions for new trial may be appealed separately. — Each party has right to make motion for new trial independently of the other and to test ruling thereon by separate appeal, so that neither may be dismissed against movant's will. *Munday v. Brissette*, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Appeals from denials of motions for judgment n.o.v. or for new trial are unnecessary. — Since enumeration of errors is deemed to include all judgments necessary to determine appeal, it is no longer necessary to appeal from denial of motions for judgment n.o.v. or for new trial. *Contractors Mgt. Corp. v. McDowell-Kelley, Inc.*, 136 Ga. App. 116, 220 S.E.2d 473 (1975).

Remedy for erroneous ruling on motion to dismiss is appeal. — If trial court commits error by abusing its discretion in ruling on motion to dismiss appeal under this section, appeal should be filed from order of trial court by losing party as provided by law and not by new motion to dismiss appeal in appellate court. *Gilman Paper Co. v. James*, 235 Ga. 348, 219 S.E.2d 447 (1975).

Burden is on appellant to bring up necessary record and to specify intended omissions. — Burden is on appellant in first instance to bring up all record and evidence introduced under it bearing on review of his enumerations of error, and in particular it is his duty, if he wishes something omitted, to state it with precision in his notice of appeal pursuant to § 5-6-42. *Ayers Enterprises, Ltd. v. Adams*, 131 Ga. App. 12, 205 S.E.2d 16 (1974).

Notice specifically designating nonfinal judgment. — Subsection (f) providing for

situations where notice of appeal fails "to specify definitely the judgment" is inapplicable where notice of appeal does specifically designate a particular order, but one which does not constitute a final judgment. *Thompson v. Consumer Credit of Valdosta, Inc.*, 123 Ga. App. 281, 180 S.E.2d 595 (1971).

All matter forwarded on appeal must be part of transcript. — Subsection (f) does not require all matter to be forwarded to Court of Appeals, but only that all matter so forwarded shall be part of the transcript rather than, as was formerly permissible, included as an exhibit to the bill of exceptions (see §§ 5-6-49, 5-6-50) or assignments of error. *G.E.C. Corp. v. Southern Fabricators, Inc.*, 122 Ga. App. 452, 177 S.E.2d 497 (1970).

Judges of superior courts have no jurisdiction to dismiss appeal pending in either of appellate courts. *Davis v. Davis*, 222 Ga. 369, 149 S.E.2d 802 (1966).

Party's failure to comply with order of another court cannot be the basis for the appellate court to dismiss an appeal. *Hawn v. Chastain*, 154 Ga. App. 609, 269 S.E.2d 50, rev'd on other grounds, 246 Ga. 723, 273 S.E.2d 135 (1980).

Dismissing appeal for disobedience of appellate court's own order is not precluded by this section. *Hawn v. Chastain*, 154 Ga. App. 609, 269 S.E.2d 50 (1980).

When appellant becomes a fugitive from justice after filing notice, the appeal can be dismissed. *Russell v. State*, 152 Ga. App. 663, 263 S.E.2d 552 (1979).

Where trial judge dismissed case previously and reversal would not benefit appellants dismissal of the appeal is required. *McGilliard v. Jones*, 133 Ga. App. 44, 209 S.E.2d 664 (1974).

Supreme Court of Georgia may take judicial notice of its own records in immediate case or proceedings before it. *Davis v. Davis*, 222 Ga. 369, 149 S.E.2d 802 (1966).

Specific grounds stated for directed verdict must be same ones asserted on appeal. — An enumeration of error in a dispossessory case as to the trial court's failure to direct a verdict on the grounds of the lessor's failure to prove demand for possession cannot be construed to encompass, as error, the later refusal to grant judgment n.o.v. on the basis of the lessee's

belatedly raised "complete defense" of payment of rent. The trial court's refusal to direct a verdict cannot be expanded to encompass other defects on appeal, because the specific grounds stated for the directed verdict must be the same ones asserted on appeal. *Able-Craft, Inc. v. Bradshaw*, 167 Ga. App. 725, 307 S.E.2d 671 (1983).

Jurisdiction over cross-appeal. — When an appeal from the denial of a summary judgment motion is filed as a cross-appeal, appellate jurisdiction over the cross-appeal necessarily arises from the court's jurisdiction over the main appeal from the directly appealable order, and thus the cross-appeal must derive its life from the main appeal. *Serco Co. v. Choice Bumper, Inc.*, 199 Ga. App. 846, 406 S.E.2d 276 (1991).

Survival of cross-appeal after dismissal of main appeal. — Although under subsection (e), a cross-appeal may survive the dismissal of the main appeal, this is true only where the cross-appeal can stand on its own merit. *Serco Co. v. Choice Bumper, Inc.*, 199 Ga. App. 846, 406 S.E.2d 276 (1991).

Dismissal of cross-appeal with main appeal. — Where the main appeal is dismissed for failure to comply with § 5-6-35(a)(6), any cross-appeal which is dependent on that main appeal will also be dismissed. *Jones Roofing & Constr. Co. v. Roberts*, 179 Ga. App. 169, 345 S.E.2d 683 (1986).

Unreasonable delay in filing transcript caused by conduct of appellant or attorney. — Where neither the appellant nor his counsel (trial or appellate) files the transcript within 30 days of the filing of the notice of appeal (or, within 30 days of the entry of judgment), nor is any request made for an extension of time for filing, the appellate counsel's efforts being concentrated on attempting to obtain a release from trial counsel of the transcript, and there is no issue of substantive or technical ineffective assistance of counsel, the delay in filing the transcript is unreasonable and the unreasonable delay is inexcusable and is caused by appellant's conduct or his conduct in concert with that of his attorney. *Curtis v. State*, 168 Ga. App. 235, 308 S.E.2d 599 (1983).

Where trial court failed to conduct a hearing to decide appellant's motion for extension of time for filing a transcript, but instead granted defendant's motion to dismiss

Application Generally (Cont'd)

the appeal without hearing or notice of hearing to appellant, the trial court's action was error and the matter remanded for a determination on whether the delay in forwarding the transcript was both unreasonable and inexcusable. *Hosch v. Pickett*, 172 Ga. App. 13, 321 S.E.2d 777 (1984).

Court did not err in finding 51 day delay in transmitting transcript unreasonable, and to be inexcusably caused by appellant's failure to pay costs, even after he admittedly had received notice of the amount due, although not by registered or certified mail. *Neese v. Long*, 178 Ga. App. 105, 341 S.E.2d 861 (1986).

Appellant not obligated to prepare record. — The obligation of the appellant relates to the transcript, and the obligation for the preparation of the record rests with the clerk. After the appellant has filed a notice of appeal, his duty as to the record is limited to the payment of costs. Where the clerk fails to transmit the record, but there is no indication that this failure is occasioned by the failure of a party to pay costs, the trial court has no discretion to dismiss the appeal. *Long v. City of Midway*, 251 Ga. 364, 306 S.E.2d 639 (1983).

Neither improper certification of service of brief or failure to support enumerated error by specific reference to the record or transcript is a statutorily recognized ground for dismissal of an appeal. *Allen v. Abko Properties, Inc.*, 166 Ga. App. 776, 305 S.E.2d 477 (1983).

Appeal dismissed for failure to file notice of appeal within time required by statute. See *Mathis v. Hegwood*, 169 Ga. App. 547, 314 S.E.2d 122, cert. denied, 469 U.S. 830, 105 S. Ct. 115, 83 L. Ed. 2d 58 (1984).

Case dismissed for lack of jurisdiction. See *Fredericks v. State*, 168 Ga. App. 278, 308 S.E.2d 693 (1983).

Effect of action in sister state. — That an insurer filed a declaratory judgment action which has since resulted in a final declaratory judgment that no coverage exists, and which was pending at the time the insured initiated the instant Georgia action, is not a ground for dismissing the instant appeals. *Atlantic Wood Indus., Inc. v. Lumbermen's Underwriting Alliance*, 196 Ga. App. 503, 396 S.E.2d 541, cert. denied, 498 U.S. 1085, 111 S. Ct. 958, 112 L. Ed. 2d 1046 (1990).

Motion to dismiss appeal denied. See *First Fed. Sav. & Loan Ass'n v. White*, 168 Ga. App. 516, 309 S.E.2d 858 (1983).

Dismissal inappropriate sanction for party's refusal to sign deposition. — Dismissal of a party's appeal is not an appropriate sanction for the party's failure to comply with an order to review and sign a deposition. *Gerdes v. Dziewinski*, 182 Ga. App. 764, 357 S.E.2d 110 (1987).

Dismissal proper for delay in ordering transcript. — There was no abuse of discretion by the trial court's dismissal of the appellant's appeal based on the appellant's unreasonable and inexcusable delay in ordering the transcript. *Kleber v. Cobb County*, 212 Ga. App. 441, 442 S.E.2d 296 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 316-322. 5 Am. Jur. 2d, Appeal and Error, §§ 905, 906.

C.J.S. — 5 C.J.S., Appeal and Error, §§ 632-640.

ALR. — Public interest as ground for refusal to dismiss an appeal, where question

has become moot, or dismissal is sought by one or both parties, 132 ALR 1185.

Dismissal of appeal for appellant's failure to obey court order, 49 ALR2d 1425.

Dismissal of appeal or writ of error for want of prosecution as bar to subsequent appeal, 96 ALR2d 312.

5-6-49. Bills of exceptions, exceptions pendente lite, assignments of error abolished; contents of motions for new trial and for j.n.o.v.

(a) Bills of exceptions, exceptions pendente lite, assignments of error, and all rules relating thereto are abolished.

(b) Motions for new trial and for judgment notwithstanding the verdict need not set out portions of the record or transcript of evidence and it shall not be necessary that the grounds thereof be complete in themselves or be approved by the court; provided, however, that the motions must be sufficiently definite to inform the opposite party of the contention of the movant. (Ga. L. 1965, p. 18, § 3.)

Cross references. — Rulings on motions for judgment notwithstanding the verdict and motions for new trial, § 9-11-50.

JUDICIAL DECISIONS

Time limitation for grant of new trial on unspecified grounds on court's own motion. — Court may not grant new trial on unspecified ground on own motion after more than 30 days from entry of judgment and after expiration of term. *Darby v. Commercial Bank*, 135 Ga. App. 462, 218 S.E.2d 252 (1975), overruled on other grounds, *Smith v. Telecab of Columbus, Inc.*, 140 Ga. App. 755, 232 S.E.2d 100 (1976).

Cited in *Murcherson v. State*, 112 Ga. App. 299, 145 S.E.2d 58 (1965); *Bishop v. Lamkin*,

221 Ga. 691, 146 S.E.2d 769 (1966); *Wright v. Wright*, 222 Ga. 777, 152 S.E.2d 363 (1966); *Travelers Ins. Co. v. Merritt*, 124 Ga. App. 42, 183 S.E.2d 73 (1971); *Brown v. Rooks*, 139 Ga. App. 770, 229 S.E.2d 548 (1976); *State v. Eubanks*, 239 Ga. 483, 238 S.E.2d 38 (1977); *Hienrichsen v. Harris*, 155 Ga. App. 810, 273 S.E.2d 213 (1980); *Turner v. National Bank*, 160 Ga. App. 165, 286 S.E.2d 500 (1981); *Hiers-Wright Assocs. v. Manufacturers Hanover Mtg. Corp.*, 182 Ga. App. 732, 356 S.E.2d 903 (1987).

RESEARCH REFERENCES

C.J.S. — 4 C.J.S., Appeal and Error, §§ 578-603.

5-6-50. Procedure provided by article supersedes former appellate procedure.

The procedure provided in this article shall serve all purposes which a bill of exceptions or writ of error has served in the past; and, where under any law of force in this state provision is made for the taking of writs of error or bills of exception, the procedure prescribed in this article shall be deemed to apply in lieu thereof as to the procedure and as to all time requirements. (Ga. L. 1965, p. 18, § 19.)

JUDICIAL DECISIONS

Judgments traditionally reviewable under writ of error are reviewable under notice of appeal. — Basically whatever judgments were traditionally reviewable as being final judgment under a writ of error are reviewable under a notice of appeal. *Crowe v. Holloway Dev. Corp.*, 114 Ga. App. 856, 152 S.E.2d 913 (1966).

Cited in *Bishop v. Lamkin*, 221 Ga. 691, 146 S.E.2d 769 (1966); *Peters v. Liberty Mut. Ins. Co.*, 113 Ga. App. 41, 147 S.E.2d 26 (1966); *Travelers Ins. Co. v. Merritt*, 124 Ga. App. 42, 183 S.E.2d 73 (1971); *Rucker v. State*, 124 Ga. App. 491, 184 S.E.2d 228 (1971); *Milam v. Housing Auth.*, 129 Ga. App. 188, 199 S.E.2d 107 (1973); *State v.*

Eubanks, 239 Ga. 483, 238 S.E.2d 38 (1977); & Assocs., 168 Ga. App. 611, 309 S.E.2d 893
Middle Ga. Bank v. Continental Real Estate (1983).

RESEARCH REFERENCES¹

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, §§ 417-426.

5-6-51. Forms.

The following suggested forms are declared to be sufficient, but any other form substantially complying therewith shall also be sufficient:

(1) NOTICE OF APPEAL — CIVIL CASES.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiffs)	
)	
v.)	Civil action
)	File no. _____
)	
_____)	
Defendants)	

NOTICE OF APPEAL

Notice is hereby given that _____ and _____, defendants above-named, hereby appeal to the _____ (Court of Appeals or Supreme Court) from the _____ (describe order or judgment) entered in this action on _____, 19____.

Motion for new trial (or motion for judgment n.o.v., etc.) was filed and overruled (or granted, etc.) on _____, 19____.

The clerk will please omit the following from the record on appeal:

- 1.
- 2.
- 3.

Transcript of evidence and proceedings will/will not be filed for inclusion in the record on appeal.

This court, rather than the (Court of Appeals or Supreme Court) has jurisdiction of this case on appeal for the reason that _____.

Dated: _____, 19____.

Attorney for appellants

Address

(CERTIFICATE OF SERVICE)

(2) NOTICE OF APPEAL — CRIMINAL CASES.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
The State (etc.))	
)	
)	(Indictment)
v.)	(Accusation)
)	No. _____
_____)	
Defendant)	

NOTICE OF APPEAL

Notice is hereby given that _____, defendant above-named, hereby appeals to the _____ (Court of Appeals or Supreme Court) from the judgment of conviction and sentence entered herein on _____, 19____.

The offense(s) for which defendant was convicted is (are) _____, and the sentence(s) imposed is (are) as follows: _____.

Motion for new trial (or motion in arrest of judgment, etc.) was filed and overruled on _____, 19____.

The clerk will please omit the following from the record on appeal:

- 1.
- 2.
- 3.

Transcript of evidence and proceedings will/will not be filed for inclusion in the record on appeal.

This court, rather than the (Court of Appeals or Supreme Court) has jurisdiction of this case on appeal for the reason that _____.

Dated: _____, 19____.

Attorney for appellant

Address

(CERTIFICATE OF SERVICE)

(3) NOTICE OF CROSS APPEAL.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

Plaintiffs

V.

Civil action

File no. _____

Defendants

NOTICE OF CROSS APPEAL

Notice is hereby given that _____, one of the defendants above-named, hereby cross appeals to the _____ (Court of Appeals or Supreme Court) from the _____ (describe order or judgment) entered in this action on _____, 19____.

Notice of appeal was heretofore filed on _____, 19____.

The clerk will please include the following in the record on appeal, all of which were designated for omission by appellant:

- 1.
- 2.
- 3.

Transcript of evidence and proceedings (will be filed) (will not be filed) (has already been designated to be filed by appellant) for inclusion in the record on appeal.

Dated: _____, 19____.

Attorney for cross appellant

Address

(CERTIFICATE OF SERVICE)

(4) ENUMERATION OF ERRORS.

ENUMERATION OF ERRORS

1. The court erred in charging the jury on gross negligence.
2. The court erred in admitting the testimony of witness Smith concerning his opinion as to how the collision happened.
3. The court erred in refusing to grant a mistrial because of the misconduct of plaintiff's attorney in oral argument.

4. The court erred in refusing to admit in evidence testimony of witness Jones concerning his estimate as to damages.

5. The court erred in denying defendant's motion for continuance.

(Ga. L. 1965, p. 18, § 20; Ga. L. 1966, p. 493, §§ 8, 8A; Ga. L. 1973, p. 303, § 2; Ga. L. 1984, p. 22, § 5.)

Cross references. — Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Objections to records or transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 47.

Code Commission notes. — The sentences in paragraphs (1) and (2) relating to motion for new trial or motion for judgment n.o.v. would be included only where such a motion was filed, for the purpose of showing that the time for appeal from the judgment

complained of had been automatically extended under Code Section 5-6-38.

Law reviews. — For article, "The Appellate Procedure Act of 1965," (Art. 2, Ch. 6, T. 5), see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," (Art. 2, Ch. 6, T. 5), see 2 Ga. St. B.J. 433 (1966). For article, "The 1967 Amendments to the Georgia Civil Practice Act (Ch. 11, T. 9), and the Appellate Procedure Act (Art. 2, Ch. 6, T. 5)," see 3 Ga. St. B.J. 383 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ENUMERATION OF ERROR

1. FORM

2. CONTENT

General Consideration

Under this article, appeals are decided on their merits. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Cited in *Mobley v. State*, 221 Ga. 716, 146 S.E.2d 735 (1966); *Interstate Fire Ins. Co. v. Chattam*, 222 Ga. 436, 150 S.E.2d 618 (1966), answer conformed to, 114 Ga. App. 332, 151 S.E.2d 486 (1966); *Hardnett v. United States Fid. & Guar. Co.*, 116 Ga. App. 732, 158 S.E.2d 303 (1967); *Noble v. State Hwy. Dep't*, 117 Ga. App. 33, 159 S.E.2d 715 (1967); *City of Atlanta v. Barton*, 153 Ga. App. 426, 265 S.E.2d 345 (1980); *Smiway, Inc. v. DOT*, 178 Ga. App. 414, 343 S.E.2d 497 (1986).

Enumeration of Error

1. Form

Section sets out forms for enumerations of error and makes them sufficient without reasons given. *Dawson v. Garner*, 119 Ga. App. 469, 167 S.E.2d 741 (1969).

Fact that notice of appeal is not in form

suggested in section is immaterial for reason that section specifically provides that "any other form substantially complying therewith shall be sufficient." *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966).

While enumerated errors are in proper form they may still be ruled insufficient or held not to be meritorious from record. *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

2. Content

Enumeration must identify subject matter of objection. — This section, although allowing enumerations of error in highly abbreviated notice form, at very least requires that subject of objection be identified. *DeKalb County v. Fulton Nat'l Bank*, 156 Ga. App. 253, 274 S.E.2d 649 (1980).

Subject matter of objection need be indicated only in a general way. *Pinyan v. Liberty Mut. Ins. Co.*, 113 Ga. App. 130, 147 S.E.2d 452 (1966); *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Errors apparent from notice, record, enu-

Enumeration of Error (Cont'd)**2. Content** (Cont'd)

meration or combination thereof. — Where it is apparent from the notice of appeal, the record, the enumerations of error, or any combination of the foregoing, what errors are sought to be asserted upon appeal, the appeal shall be considered notwithstanding that the enumerations of error fail to enumerate clearly the errors sought to be reviewed. *Robinson v. State*, 210 Ga. App. 278, 435 S.E.2d 718 (1993).

Where error enumerated is not intelligible in itself the brief must make it so, or court has nothing before it for decision. *Pinyan v. Liberty Mut. Ins. Co.*, 113 Ga. App. 130, 147 S.E.2d 452 (1966); *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Since subject matter need be indicated

only in most general way, appellate court frequently cannot identify or pass upon contention which appellant seeks to urge as cause for reversal unless made intelligible in brief. *Wall v. Rhodes*, 112 Ga. App. 572, 145 S.E.2d 756 (1965).

Hazy, yet conforming, enumeration suffices. — See *MacDonald v. MacDonald*, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Raising inadequacy of damages by enumerating general grounds of motion for new trial. — Although good practice would call for enumerating as error the inadequacy of jury's verdict for damages, question of inadequacy is sufficiently raised for consideration by court where overruling of general grounds of a motion for new trial is enumerated as error, and question of inadequacy of verdict is presented and argued in briefs. *Kirkman v. Miller*, 116 Ga. App. 78, 156 S.E.2d 558 (1967).

RESEARCH REFERENCES

ALR. — Failure, due to fraud, duress, or misrepresentation by adverse party, to file notice of appeal within prescribed time, 149 ALR 1261.

Adequacy of defense counsel's representation of criminal client regarding venue and recusal matters, 7 ALR4th 942.

CHAPTER 7

APPEAL OR CERTIORARI BY STATE IN CRIMINAL CASES

Sec.		Sec.	
5-7-1.	Orders, decisions, or judgments appealable; defendant's right to cross appeal.	5-7-3.	Right of certiorari.
5-7-1.1.	Right of state to direct appeal in certain delinquency cases.	5-7-4.	Time limits and procedures governing appeal and certiorari by state.
5-7-2.	Certification required for immediate review of nonfinal orders, decisions, or judgments.	5-7-5.	Right of accused to bail; amount of bail reviewable by appellate court.

Law reviews. — For article, "The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act," see 3 Ga. St. B.J. 383 (1967).

JUDICIAL DECISIONS

Chapter strictly construed in allowing appeals. — In allowing appeals under any specific provision of this chapter, the statute must be strictly construed. *State v. Watson*, 143 Ga. App. 785, 240 S.E.2d 194 (1977). **Cited in** *State v. Gould*, 232 Ga. 844, 209 S.E.2d 312 (1974); *State v. Blossfield*, 165 Ga. App. 111, 299 S.E.2d 588 (1983).

RESEARCH REFERENCES

ALR. — Appealability of order suspending imposition or execution of sentence, 51 ALR4th 939.

5-7-1. Orders, decisions, or judgments appealable; defendant's right to cross appeal.

(a) An appeal may be taken by and on behalf of the State of Georgia from the superior courts and such other courts from which a direct appeal is authorized to the Court of Appeals of Georgia and the Supreme Court of Georgia in criminal cases in the following instances:

- (1) From an order, decision, or judgment setting aside or dismissing any indictment or accusation or any count thereof;
- (2) From an order, decision, or judgment arresting judgment of conviction upon legal grounds;
- (3) From an order, decision, or judgment sustaining a plea or motion in bar, when the defendant has not been put in jeopardy;
- (4) From an order, decision, or judgment sustaining a motion to suppress evidence illegally seized in the case of motions made and ruled upon prior to the impaneling of a jury; or

(5) From an order, decision, or judgment transferring a case to the juvenile court pursuant to subparagraph (b)(2)(B) of Code Section 15-11-5.

(b) In any instance in which any appeal is taken by and on behalf of the State of Georgia in a criminal case, the defendant shall have the right to cross appeal. Such cross appeal shall be subject to the same rules of practice and procedure as provided for in civil cases under Code Section 5-6-38. (Ga. L. 1973, p. 297, § 1; Ga. L. 1984, p. 22, § 5; Ga. L. 1994, p. 311, § 1; Ga. L. 1994, p. 1012, § 28.)

The 1994 amendments. — The first 1994 amendment, effective March 25, 1994, designated the existing language of this Code section as subsection (a) and added subsection (b). The second 1994 amendment, effective May 1, 1994, and applicable to all offenses committed on or after that date, in present subsection (a), deleted “or” at the end of paragraph (3), deleted the period and added “; or” at the end of paragraph (4), and added paragraph (5).

Cross references. — Payment by state of bill of costs in appeals or applications filed on behalf of state by a district attorney, § 15-18-13. Unified appeal, Uniform Superior Court Rules, Rule 34.

Editor’s notes. — Ga. L. 1994, p. 1012, § 1, not codified by the General Assembly, provides that the Act shall be known and may be cited as the “School Safety and Juvenile Justice Reform Act of 1994.”

Ga. L. 1994, p. 1012, § 2, not codified by the General Assembly, sets forth legislative findings and determinations for the “School Safety and Juvenile Justice Reform Act of 1994.”

Ga. L. 1994, p. 1012, § 29, not codified by

the General Assembly, provides: “In the event any section, subsection, sentence, clause, or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full force and effect as if the section, subsection, sentence, clause, or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional.”

Law reviews. — For survey of cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JUDGMENTS DISMISSING INDICTMENT OR ACCUSATIONS

JUDGMENTS SUSTAINING PLEAS IN BAR

DOUBLE JEOPARDY

ORDERS SUPPRESSING EVIDENCE

APPLICATION GENERALLY

General Consideration

Section must be construed strictly against state in allowing appeals under specific con

ditions provided by General Assembly. *State v. Clendinin*, 136 Ga. App. 303, 221 S.E.2d 71 (1975), overruled on other grounds, 253 Ga. 287, 319 S.E.2d 864 (1984); *State v.*

McIntyre, 191 Ga. App. 565, 382 S.E.2d 669 (1989); State v. Clark, 191 Ga. App. 708, 382 S.E.2d 670, cert. denied, State v. Clark, 191 Ga. App. 708, 382 S.E.2d 670; State v. Sosebee, 191 Ga. App. 725, 382 S.E.2d 681 (1989).

The General Assembly having placed in this section specific conditions upon appeals by state in criminal cases, the Court of Appeals will not by judicial construction extend the right of appeal beyond these instances, especially where intent is expressed to limit state to appeals under this chapter. State v. Hollomon, 132 Ga. App. 304, 208 S.E.2d 167 (1974).

State may appeal directly illegal judgment.

— Notwithstanding the provisions of this Code section, the state may appeal directly an illegal judgment. State v. Bilal, 192 Ga. App. 185, 384 S.E.2d 253 (1989); State v. Mohamed, 203 Ga. App. 21, 416 S.E.2d 358 (1992); State v. James, 211 Ga. App. 149, 438 S.E.2d 399 (1993).

Order compelling return of seized property to defendant. — State could not appeal from order compelling the return of seized property to defendant, where the state stipulated it would not use the property at issue in the trial of the charges pending against defendant, and the state did not challenge the trial court's ruling on defendant's motion to suppress. State v. McIntyre, 191 Ga. App. 565, 382 S.E.2d 669 (1989).

State may not appeal grant of new trial. —

Where, at the close of the defendant's evidence, the court volunteered that in its opinion the state had failed to prove the criminal trespass charge and that, if the jury returned a verdict of guilty, the court would either "set that judgment aside" or "grant a motion for new trial instantly" if defendant requested one on that basis and, immediately following return of the verdicts, the court stated that it was granting "a new trial" on the criminal trespass charge, the court effectively acquitted defendant. Even if the order had been a proper grant of new trial, it would not have been appealable by the State, as it is not encompassed in § 5-7-1. State v. Seignious, 197 Ga. App. 766, 399 S.E.2d 559 (1990).

Order striking immaterial allegation of accusation could not be appealed by the state. State v. Phillips, 206 Ga. App. 421, 425 S.E.2d 412 (1992).

The state cannot circumvent this section and create avenues for appeal by requesting a trial court convert an adverse evidentiary ruling into a motion to quash the indictment and then appeal the adverse ruling that it requested. State v. Land-O-Sun Dairies, Inc., 204 Ga. App. 485, 419 S.E.2d 743 (1992).

A revocation of probation hearing. —

Appeal by the state from the grant of probationer's motion to suppress was dismissed since a revocation of probation hearing is not a criminal proceeding for purposes of a direct appeal; jurisdiction would lie upon application only. State v. Wilbanks, 215 Ga. App. 223, 450 S.E.2d 293 (1994).

Cited in State v. David, 130 Ga. App. 872, 204 S.E.2d 773 (1974); State v. Ogles, 133 Ga. App. 802, 213 S.E.2d 60 (1975); State v. Houston, 134 Ga. App. 36, 213 S.E.2d 139 (1975); Potts v. State, 236 Ga. 230, 223 S.E.2d 120 (1976); State v. McCranie, 137 Ga. App. 369, 223 S.E.2d 765 (1976); State v. Moore, 237 Ga. 269, 227 S.E.2d 241 (1976); State v. Rowe, 138 Ga. App. 904, 228 S.E.2d 3 (1976); State v. Foster, 141 Ga. App. 258, 233 S.E.2d 215 (1977); State v. Holmes, 142 Ga. App. 847, 237 S.E.2d 406 (1977); State v. Strickland, 144 Ga. App. 128, 240 S.E.2d 579 (1977); State v. Tuzman, 145 Ga. App. 481, 243 S.E.2d 675 (1978); State v. White, 145 Ga. App. 730, 244 S.E.2d 579 (1978); State v. Bowen, 145 Ga. App. 790, 245 S.E.2d 10 (1978); State v. Willis, 149 Ga. App. 509, 254 S.E.2d 743 (1979); Adult Bookmart, Inc. v. State, 152 Ga. App. 838, 264 S.E.2d 273 (1979); State v. Benton, 154 Ga. App. 141, 267 S.E.2d 775 (1980); State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980); State v. Williams, 157 Ga. App. 393, 278 S.E.2d 499 (1981); State v. Izquierdo, 160 Ga. App. 33, 285 S.E.2d 769 (1981); State v. Bigler, 160 Ga. App. 225, 286 S.E.2d 758 (1981); Parrish v. State, 160 Ga. App. 601, 287 S.E.2d 603 (1981); State v. Hopkins, 163 Ga. App. 141, 293 S.E.2d 529 (1982); State v. Chumley, 164 Ga. App. 828, 299 S.E.2d 564 (1982); State v. Allen, 165 Ga. App. 86, 299 S.E.2d 158 (1983); State v. Gardner, 254 Ga. 264, 328 S.E.2d 546 (1985); State v. Thomas, 176 Ga. App. 106, 335 S.E.2d 697 (1985); State v. Harris, 256 Ga. 24, 343 S.E.2d 483 (1986); State v. Howell, 180 Ga. App. 449, 349 S.E.2d 476 (1986); Doe v. State, 185 Ga. App. 347, 364 S.E.2d 78 (1987); State v. Eaves, 185 Ga. App. 740, 365 S.E.2d 535 (1988); State v. Richardson, 186 Ga. App. 888, 368 S.E.2d 825 (1988); State v. Greenwood, 206 Ga.

General Consideration (Cont'd)

App. 188, 424 S.E.2d 870 (1992); *Brooks v. State*, 206 Ga. App. 485, 425 S.E.2d 911 (1992); *In re R.J.C.*, 210 Ga. App. 286, 435 S.E.2d 759 (1993); *State v. Schuman*, 212 Ga. App. 231, 441 S.E.2d 466 (1994); *State v. Williams*, 212 Ga. App. 164, 441 S.E.2d 501 (1994); *State v. Crank*, 212 Ga. App. 246, 441 S.E.2d 531 (1994).

Judgments Dismissing Indictment or Accusations

State may appeal order dismissing indictment even if order is entered during trial. *State v. Williams*, 246 Ga. 788, 272 S.E.2d 725 (1980).

State was entitled to appeal directly from the sustaining of defendant's special demurrer, because the sustaining of a special demurrer, the result of which is either to strike from or add to the material allegations of an indictment, is equivalent to sustaining a general demurrer and quashing the indictment. *State v. Mendoza*, 190 Ga. App. 831, 380 S.E.2d 357 (1989).

Authority to dismiss charge. — Where a criminal case was called for trial, the court granted the state's motion for continuance and the case was then reset for trial, and the state was not ready to try the case on that date, the court properly dismissed the charges against the defendant. *State v. Grimes*, 194 Ga. App. 736, 392 S.E.2d 727 (1990).

Judgments Sustaining Pleas in Bar

Discharge and acquittal based on denial of demand for trial. — State may appeal trial court's grant of criminal defendant's motion for discharge and acquittal, where such motion is based on denial of defendant's demand for trial pursuant to § 17-7-170, as such motion constitutes a plea in bar. *State v. Benton*, 246 Ga. 132, 269 S.E.2d 470 (1980). But see *State v. Clendinin*, 136 Ga. App. 303, 221 S.E.2d 71 (1975).

Double Jeopardy

Determining questions of double jeopardy. — Title 16 contains proscription of double jeopardy beyond that provided for in the United States and Georgia Constitutions. Therefore questions of double jeopardy in

Georgia must now be determined under expanded statutory proscriptions: §§ 16-1-6, 16-1-7 and 16-1-8. *State v. Warren*, 133 Ga. App. 793, 213 S.E.2d 53 (1975).

State has a right to appeal the grant of a plea in bar based on double jeopardy. *State v. Stowe*, 167 Ga. App. 65, 306 S.E.2d 663 (1983).

Orders Suppressing Evidence

Appeal permitted from pretrial exclusions. — This Code section is not so limited in scope as to authorize the state to appeal only from the grant of a pretrial motion to suppress under § 17-5-30. If the defendant in a criminal case files any pretrial motion to exclude evidence on the ground that it was obtained in violation of law, the grant of such a motion may be appealed by the state. *State v. McKenna*, 199 Ga. App. 206, 404 S.E.2d 278 (1991).

Basis for suppression order. — Paragraph (4) authorizes the state to bring a direct appeal only when the trial court's exclusion of evidence is based upon the determination that the state unlawfully obtained it, and not when the exclusion is based upon some general rule of evidence. *State v. Brown*, 185 Ga. App. 701, 365 S.E.2d 865 (1988); *State v. Lavell*, 214 Ga. App. 525, 448 S.E.2d 270 (1994).

"Evidence" is not necessarily physical or externally real. — Paragraph (4) refers to "evidence," not "property," and "evidence" is not necessarily physical or externally real. *State v. Watson*, 143 Ga. App. 785, 240 S.E.2d 194 (1977).

State may appeal orders suppressing oral admissions, or written or tape recorded statements. — State has right under section to appeal trial judge's order suppressing as evidence any oral admissions, written statements, or tape recordings of statements made to law enforcement officers while in custody. *State v. Watson*, 143 Ga. App. 785, 240 S.E.2d 194 (1977).

Motion, in whatever form, to exclude evidence appealable by state. — If a defendant moves before trial to exclude evidence on the ground that it was obtained in violation of law, the grant of such a motion, whatever its name, is subject to direct appeal on the part of the state. *Strickman v. State*, 253 Ga. 287, 319 S.E.2d 864 (1984); *State v. McCard*, 173 Ga. App. 504, 326 S.E.2d 856 (1985);

State v. Frye, 205 Ga. App. 508, 422 S.E.2d 915 (1992); State v. Peters, 213 Ga. App. 352, 444 S.E.2d 609 (1994).

Motion made and ruled on in mid-trial. — A suppression motion which has been made and ruled upon in mid-trial is not an order which may be appealed by the state. State v. Lawrence, 208 Ga. App. 588, 431 S.E.2d 409 (1993).

Decision to exclude testimony of intoximeter test. — The state had no right of direct appeal from a decision by the trial court to exclude testimony regarding the results of an intoximeter test which had been administered to defendant at the time of his arrest, where the state failed to provide him with a copy of the test results. State v. Gosch, 179 Ga. App. 613, 347 S.E.2d 353 (1986).

Where defendant's pretrial motion did not seek the exclusion of any evidence on the ground that it had been obtained in violation of law, and the exclusion of intoximeter test results was based upon the trial court's finding of a material alteration thereof, paragraph (4) was not authority for the state to bring an appeal. State v. McKenna, 199 Ga. App. 206, 404 S.E.2d 278 (1991).

Application Generally

Directed verdicts of acquittal are not appealable judgments. State v. Warren, 133 Ga. App. 793, 213 S.E.2d 53 (1975), rev'd on other grounds, 246 Ga. 788, 272 S.E.2d 725 (1980); State v. Williams, 155 Ga. App. 144, 270 S.E.2d 281 (1980).

The government may not appeal a trial court's grant to a criminal defendant of a directed verdict of acquittal based on insufficiency of evidence to support conviction, in that new trial would be barred by double jeopardy clause of fifth amendment. State v. Williams, 246 Ga. 788, 272 S.E.2d 725 (1980).

Trial court's determination that the state did not establish the essential elements of burglary constituted a directed verdict of acquittal on the merits, and the state could not appeal and subject defendants to a new trial on the merits. State v. Bryant, 182 Ga. App. 698, 356 S.E.2d 656 (1987).

State had no right to appeal in the case of an acquittal. State v. Fly, 193 Ga. App. 190, 387 S.E.2d 347, cert. denied, 193 Ga. App. 911, 387 S.E.2d 347 (1989).

No direct appeal in delinquency case. — The statute only allows the state to appeal directly in criminal cases and not in a delinquency case, i.e., a civil case. In re D.Q.H., 212 Ga. App. 271, 441 S.E.2d 411 (1994).

Dismissal of charges before jeopardy attaches. — Entry of a directed verdict of acquittal based on an insufficiency of the evidence to support the charge is not generally appealable by the state. An exception exists where the trial court dismisses charges on erroneous grounds before jeopardy attaches. State v. Vansant, 208 Ga. App. 772, 431 S.E.2d 708 (1993), aff'd in part and rev'd in part, 264 Ga. 319, 443 S.E.2d 474 (1994), vacated on other grounds, 214 Ga. App. 127, 447 S.E.2d 348 (1994).

Appellate jurisdiction not found. — This court has declined to find appellate jurisdiction when the state appealed an order granting a defendant's motion in limine on general evidentiary grounds. State v. Land-O-Sun Dairies, Inc., 204 Ga. App. 485, 419 S.E.2d 743 (1992).

Order discharging and acquitting defendant under § 17-7-170 is not appealable under this section. State v. Clendinin, 136 Ga. App. 303, 221 S.E.2d 71 (1975). But see State v. Benton, 246 Ga. 132, 269 S.E.2d 470 (1980).

State is not authorized to appeal the grant of a new trial in a criminal case. State v. Thurmond, 195 Ga. App. 369, 393 S.E.2d 518 (1990).

Reinstatement of dismissed appeal. — Trial court's order reinstating a dismissed appeal in the state court is not one of the instances set out by statute from which the state may appeal. State v. Welch, 201 Ga. App. 803, 413 S.E.2d 747 (1991).

Motion in limine not a plea in bar. — Defendant's motion in limine was not a plea in bar as argued by the state and thus, this appeal was not authorized under this section. State v. Land-O-Sun Dairies, Inc., 204 Ga. App. 485, 419 S.E.2d 743 (1992).

Appeal from order denying state's motion for reconsideration of sentence is not allowed under this section. State v. O'Neal, 156 Ga. App. 384, 274 S.E.2d 575 (1980).

Dismissal for lack of prosecution. — The state's right to appeal is controlled by this section, which does not authorize an appeal from the trial court's dismissal of a case for lack of prosecution after the close of evi-

Application Generally (Cont'd)

dence. *State v. Gribble*, 169 Ga. App. 446, 313 S.E.2d 720 (1984).

Right to appeal case dismissed due to statute of limitations. — Where trial court's order appealed from was not a directed verdict of acquittal on the merits, but a dismissal because the statute of limitations, subject to judicial notice, had allegedly expired, state had right to appeal direction of verdict for defendant. *State v. Williams*, 172 Ga. App. 708, 324 S.E.2d 557 (1984).

Where defendant sought dismissal of the charges against him based on the statute of limitations, the grant of the plea effectively dismissed the indictment, and the state could appeal the ruling. *State v. Lowman*, 198 Ga. App. 8, 400 S.E.2d 373 (1990).

In a quasi-criminal proceeding on violation of a county zoning ordinance, the state was authorized under paragraph (2) of subsection (a) to appeal from the lower court's decision dismissing the citation because of expiration of the applicable limitation period, not on evidentiary grounds. *Johnson v. DeKalb County*, 214 Ga. App. 756, 449 S.E.2d 311 (1994).

Criminal defendants cannot cross appeal suits brought by state. — Despite resultant justice and judicial economy, court will not allow criminal defendants to cross appeal suits brought before court by state pursuant to this section; § 5-6-38 limits that right to civil parties and the court will not encroach upon the legislature's prerogative by extending that right. *State v. Crapse*, 173 Ga. App. 100, 325 S.E.2d 620 (1984), overruled on other grounds, *Hubbard v. State*, 176 Ga. App. 622, 337 S.E.2d 60 (1985).

Void sentences. — Although this section, enumerating those specific situations wherein the state may appeal, does not allow for appeal from an order denying the state's motion to amend sentence, void sentences are appealable by the state. *State v. Shuman*, 161 Ga. App. 304, 287 S.E.2d 757 (1982).

Where the state contended that the trial court's action in probating defendant's sentence to confinement was void, the matter would be reviewed on the premise that void sentences are appealable by the state. *State v. Johnson*, 183 Ga. App. 236, 358 S.E.2d 840, cert. denied, 183 Ga. App. 907, 358 S.E.2d 840 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appeal and Error, § 231. 14 Am. Jur. 2d, Certiorari, § 14.

C.J.S. — 24 C.J.S., Criminal Law, §§ 1675-1679.

ALR. — Adequacy of remedy by appeal in criminal cases to preclude prohibition sought on the ground of lack or loss of jurisdiction, 141 ALR 1262.

Evidence erroneously stricken out as

proper for consideration by appellate court to sustain finding or verdict, 152 ALR 371.

Constitutionality of statute permitting appeal by state in criminal case, 157 ALR 1065.

Appealability of order pertaining to pre-trial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Appeal by state of order granting new trial in criminal case, 95 ALR3d 596.

5-7-1.1. Right of state to direct appeal in certain delinquency cases.

An appeal may be taken by and on behalf of the State of Georgia from the juvenile courts and such other courts from which a direct appeal is authorized to the Court of Appeals of Georgia and the Supreme Court of Georgia in delinquency cases in the following instances:

(1) From an order, decision, or judgment sustaining a plea or motion in bar, when the defendant has not been put in jeopardy; or

(2) From an order, decision, or judgment sustaining a motion to suppress evidence illegally seized in the case of motions made and ruled

upon prior to the first witness being sworn. (Code 1981, § 5-7-1.1, enacted by Ga. L. 1994, p. 856, § 1.)

Effective date. — This Code section became effective April 5, 1994.

5-7-2. Certification required for immediate review of nonfinal orders, decisions, or judgments.

Other than from an order, decision, or judgment sustaining a motion to suppress evidence illegally seized, in any appeal under this chapter where the order, decision, or judgment is not final, it shall be necessary that the trial judge certify within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that an immediate review should be had. (Ga. L. 1973, p. 297, § 2.)

Cross references. — Review of orders, decisions, or judgments not subject to direct appeal, § 5-6-34(b).

JUDICIAL DECISIONS

State's right of appeal in criminal cases is strictly construed. — The General Assembly having placed in § 5-7-1 specific conditions upon appeals by state in criminal cases, Court of Appeals will not by judicial construction extend right of appeal beyond these instances, especially where intent is expressed to limit state to appeals under this chapter. *State v. Hollomon*, 132 Ga. App. 304, 208 S.E.2d 167 (1974).

Order final as to one count of indictment is final enough for direct appeal by state. *State v. Tuzman*, 145 Ga. App. 481, 243 S.E.2d 675 (1978).

Motion to dismiss accusation not final judgment. — Where defendant was charged with abandoning his two minor children and filed a motion to dismiss the accusation, asserting general grounds, the trial court properly denied the motion to dismiss, because defendant did not comply with the interlocutory appeal procedure prescribed by subsection (b) of Code Section 5-6-34; the overruling of defendant's motion to dismiss the accusation, leaving the case pending for trial, was not a final judgment from which appeal could be taken, absent a certificate of

immediate review. *Boyd v. State*, 191 Ga. App. 435, 383 S.E.2d 906 (1989).

Sustaining of motion to suppress evidence illegally seized authorizes direct appeal by state. *State v. Smalley*, 138 Ga. App. 747, 227 S.E.2d 488 (1976).

Interlocutory orders. — The enactment of § 5-6-34(b) which changed the method by which interlocutory orders are appealed made no essential modification of the principal effect of this section. *State v. Blossfield*, 165 Ga. App. 111, 299 S.E.2d 588 (1983).

State may not waive defendant's failure to obtain certificate. — Defendant's failure to obtain the certificate of immediate review of the trial court's judgment notwithstanding a mistrial would result in a dismissal of appeal even where the state would voluntarily waive any objection regarding the departure from the appeal procedure. *Blackburn v. State*, 169 Ga. App. 498, 314 S.E.2d 244 (1984); *State v. Strain*, 177 Ga. App. 874, 341 S.E.2d 481 (1986).

Cited in *State v. Boswell*, 131 Ga. App. 657, 206 S.E.2d 682 (1974); *State v. Roberts*, 133 Ga. App. 206, 210 S.E.2d 387 (1974).

RESEARCH REFERENCES

C.J.S. — 24 C.J.S., Criminal Law, § 1675.

5-7-3. Right of certiorari.

A proceeding by certiorari may be taken by and on behalf of the State of Georgia from one court to another court of this state, where the right of certiorari is provided as a procedure for appealing a judgment, in the specified situations set forth in Code Sections 5-7-1 and 5-7-2. (Ga. L. 1973, p. 297, § 3.)

Cross references. — Certiorari to the Court of Appeals, Rules of the Supreme Court of the State of Georgia, Rules 28 — 36.

JUDICIAL DECISIONS

Cited in *State v. Moore*, 237 Ga. 269, 227 S.E.2d 241 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 14. C.J.S. — 24 C.J.S., Criminal Law, § 1675.

5-7-4. Time limits and procedures governing appeal and certiorari by state.

An appeal by the state, except as otherwise provided for in this chapter, and certiorari by the state, when authorized by this chapter, shall be governed by the same laws and provisions as to time and other procedures as apply to other appellants in criminal cases. (Ga. L. 1973, p. 297, § 4.)

5-7-5. Right of accused to bail; amount of bail reviewable by appellate court.

In the event the state files an appeal as authorized in this chapter, the accused shall be entitled to be released on reasonable bail pending the disposition of the appeal, except in those cases punishable by death. The amount of the bail, to be set by the court, shall be reviewable on direct application by the court to which the appeal is taken. (Ga. L. 1973, p. 297, § 5.)

JUDICIAL DECISIONS

When bail may be denied generally. — A person convicted of an offense punishable by death has no constitutional right to bail pending appeal. *Wilcox v. Carter*, 545 F. Supp. 1043 (M.D. Ga. 1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Bail and Recognizance, §§ 36, 39, 41. **C.J.S.** — 8 C.J.S., Bail, §§ 107-118.

TITLE 6

AVIATION

- Chap. 1. General Provisions, 6-1-1 through 6-1-2.
2. Regulation of Aeronautics, Aircraft, and Airports Generally, 6-2-1 through 6-2-12.
3. Powers of Local Governments as to Air Facilities, 6-3-1 through 6-3-28.
4. Georgia Airport Development Authority, 6-4-1 through 6-4-16.
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Cross references. — Penalty for hijacking aircraft, § 16-5-44. Ad valorem taxation of airline companies, § 48-5-540 et seq.

RESEARCH REFERENCES

ALR. — Air navigation, 69 ALR 316.
Aeroplanes and aeronautics, 83 ALR 33;
99 ALR 173; 155 ALR 1026.

Liability of owner of wires, poles, or structures struck by airplane for resulting injury or damage, 48 ALR2d 1462.

CHAPTER 1

GENERAL PROVISIONS

Sec.		Sec.	
6-1-1.	Powers and duties of Department of Transportation — Aviation and aviation facilities generally.	6-1-2.	Powers and duties of Department of Transportation — Establishment of air markers.

6-1-1. Powers and duties of Department of Transportation — Aviation and aviation facilities generally.

The Department of Transportation shall have the following powers and duties:

(1) To plan for and establish a long-term policy in regard to the establishment, development, and maintenance of aviation and aviation facilities in the state;

(2) To promote and encourage the use of aviation facilities of the state for air commerce in the state and between the state, other states, and foreign countries;

(3) To cooperate, counsel, and advise with the State Transportation Board in regard to the planning, construction, development, and maintenance of airports, landing fields, and air navigation facilities in the state;

(4) To cooperate, counsel, and advise with municipalities and other political subdivisions of the state and with other departments, boards, bureaus, commissions, agencies, or establishments, whether federal, state, or local, or public or private, for the purpose of promoting and obtaining coordination in the planning for and in the establishment of development, maintenance, and protection of a system of air routes, airports, landing fields, and other aviation facilities in the state. (Ga. L. 1949, p. 249, § 14; Ga. L. 1959, p. 262, § 15; Ga. L. 1962, p. 694, § 7; Ga. L. 1972, p. 1015, § 2005.)

Cross references. — For further provisions regarding powers and duties of Department of Transportation regarding aviation, see § 32-2-2. As to Department of Transportation aid for airport development, see § 32-9-7. As to licensing of airports by Department of Transportation, see § 32-9-8.

OPINIONS OF THE ATTORNEY GENERAL

Department of Transportation qualifies as a “planning agency.” 1972 Op. Att’y Gen. No. 72-45.

Integration of area airport system plans into comprehensive State Airport System

Plan. — The Department of Transportation has responsibility, in accordance with provisions of planning grant agreement between Federal Aviation Administration and Department of Industry and Trade dated Decem-

ber 2, 1971, to integrate various area airport system plans into a comprehensive State Airport System Plan. 1974 Op. Att'y Gen. No. 74-39.

Authority of Department to make airport directory available to public. — One of the

duties of the board (now Department of Transportation) being to encourage use of aviation facilities, it has authority to make available to the public an airport directory. 1960-61 Op. Att'y Gen. p. 444.

6-1-2. Powers and duties of Department of Transportation — Establishment of air markers.

(a) The Department of Transportation is authorized to establish air markers at appropriate locations throughout the state to facilitate air navigation within the state. Said markers shall consist of painting on appropriately located roofs of buildings the names of towns or cities within which such buildings are located, such names to be painted in sufficient size to be legible under good visibility conditions from a height of at least 3,000 feet.

(b) The department is authorized to obtain roof releases from the owners of buildings upon which air markers are to be painted, or otherwise to obtain permission from such owners to use such roofs for such purposes, and to pay the owners reasonable and nominal rentals therefor, if payment is necessary in order to obtain the appropriate permission for the use of such roofs for such purposes. (Ga. L. 1965, p. 105, §§ 1, 2; Ga. L. 1972, p. 1015, § 2005.)

Cross references. — For similar provisions pertaining to powers and duties of department as regards aviation, see § 32-2-2.

CHAPTER 2

REGULATION OF AERONAUTICS, AIRCRAFT, AND AIRPORTS
GENERALLY

Sec.		Sec.	
6-2-1.	Legislative intent.	6-2-7.	Rules for determination of liability of owners of aircraft for damages caused by collisions.
6-2-2.	"Airman" defined.	6-2-8.	Proof of injury to persons or property on ground deemed prima-facie evidence of negligence.
6-2-3.	Effect of contractual and other legal relations entered into aboard aircraft while in flight over state.	6-2-9.	Requirements as to licensing of aircraft.
6-2-4.	Laws governing crimes committed aboard aircraft while in flight over state.	6-2-10.	Requirements as to licensing of pilots.
6-2-5.	Lawful flight over lands and waters of state.	6-2-11.	Possession and display of licenses.
6-2-5.1.	Operation or physical control of aircraft while under the influence of alcohol or drugs; penalty.	6-2-12.	Penalty for violation of provisions of chapter.
6-2-5.2.	Homicide by aircraft.		
6-2-6.	Rules for determination of liability for injury to or death of passengers.		

Cross references. — Sale of distilled spirits, malt beverages, and wine by airline passenger carriers, §§ 3-9-1, 3-9-2.

Administrative rules and regulations. — Licensing of certain public airports, Official

Compilation of Rules and Regulations of State of Georgia, Rules of State Department of Transportation, Chapter 672-9.

JUDICIAL DECISIONS

Constitutionality of chapter. — Chapter not void as violative of Georgia Constitution provision forbidding the levy of taxes by a county for any purpose other than education, building, and repairing public build-

ings and bridges, etc. *Swoger v. Glynn County*, 179 Ga. 768, 177 S.E. 723 (1934).

Cited in *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

RESEARCH REFERENCES

ALR. — Air navigation, 69 ALR 316.
Aeroplanes and aeronautics, 83 ALR 333;
99 ALR 173; 155 ALR 1026.
Construction and effect of 49 US Code

§ 1403 governing recordation of ownership, conveyances, and encumbrances on aircraft, 22 ALR3d 1270.

6-2-1. Legislative intent.

It is declared that the intent of this chapter is to coincide with the policies, principles, and practices established by the Federal Aviation Act of

1958 and all amendments thereto. (Ga. L. 1933, p. 99, § 11; Code 1933, § 11-110.)

U.S. Code. — The Federal Aviation Act of 1958, referred to in this section, is codified as 49 U.S.C. § 1301.

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, state as subject to federal regulation, 9 §§ 10, 12, 14. ALR2d 485.

ALR. — Aircraft operated wholly within

6-2-2. “Airman” defined.

As used in this chapter, the term “airman” means any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while underway; and any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; or any individual who serves in the capacity of aircraft dispatcher or air traffic control tower operator.

6-2-3. Effect of contractual and other legal relations entered into aboard aircraft while in flight over state.

All contractual and other legal relations entered into by airmen or passengers while in flight over this state shall have the same effect as if entered into on the land or water beneath. (Ga. L. 1933, p. 99, § 8; Code 1933, § 11-108.)

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, § 113.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, § 7.

6-2-4. Laws governing crimes committed aboard aircraft while in flight over state.

Unless otherwise provided by law, all crimes committed by or against an airman or by or against a passenger or other person or on or by means of an aircraft while in flight over this state shall be governed by the laws of this state. (Ga. L. 1933, p. 99, § 9; Code 1933, § 11-109.)

Cross references. — Venue for criminal actions stemming from crimes committed upon aircraft traveling within state, § 17-2-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, § 113.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, § 7.

6-2-5. Lawful flight over lands and waters of state.

Flight in aircraft over the lands and waters shall be lawful unless at such a low altitude as to interfere with the then existing reasonable use to which the land or water or space over the land or water is put by the owner of the land or water or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. (Ga. L. 1933, p. 99, § 1; Code 1933, § 11-101.)

Law reviews. — For note, "A Study of the Development and Current Status in Georgia of Inverse Condemnation Suits by a Land-

owner for Taking by Aerial Flights," see 2 Ga. St. B.J. 232 (1965).

JUDICIAL DECISIONS

Landowner is "preferred claimant" to airspace. — Owner of land is "preferred claimant" to airspace above land, and is entitled to redress for any use thereof which results in injury to him and his property. *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E.2d 245 (1942); *Scott v. Dudley*, 214 Ga. 565, 105 S.E.2d 752 (1958); *Chronister v. City of Atlanta*, 99 Ga. App. 447, 108 S.E.2d 731 (1959).

Owner's title and right to control airspace above buildings. — Owner of land has title to and a right to control airspace above it to a distance of at least 75 feet above buildings thereon (but title to airspace above land is not necessarily limited to altitude of that height). *Scott v. Dudley*, 214 Ga. 565, 105 S.E.2d 752 (1958).

Flights not interfering with owner's existing reasonable use of land. — Flights over lands at such height as not to interfere with

then existing reasonable use thereof by owner cannot be said to constitute trespass or nuisance. *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E.2d 245 (1942); *Scott v. Dudley*, 214 Ga. 565, 105 S.E.2d 752 (1958).

Frequent flights at altitudes of 50 to 75 feet constitute continuing nuisance. — Where at least 75 flights were made over plaintiff's school building daily at altitudes of 50 to 75 feet, which was just over treetops, and where the danger necessarily created thereby to the lives and safety of those occupying the premises, the noise and vibration caused thereby, and the distracting effect on the students made further operation of plaintiff's school impracticable, such substantially lessened the right to enjoy freely the use of the property and a continuing nuisance was established which equity would enjoin. *Scott v. Dudley*, 214 Ga. 565, 105 S.E.2d 752 (1958).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 3, 6.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 7, 8, 9, 10.

ALR. — Aeroplanes and aeronautics, 83 ALR 333; 99 ALR 173; 155 ALR 1026.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Validity, construction, and application of

state criminal statute prohibiting reckless operation of aircraft, 89 ALR3d 893.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

Strict liability, in absence of statute, for injury or damage occurring on the ground caused by ascent, descent, or flight of aircraft, 73 ALR4th 416.

6-2-5.1. Operation or physical control of aircraft while under the influence of alcohol or drugs; penalty.

(a) A person shall not operate or be in actual physical control of an aircraft in this state:

(1) Within eight hours after the consumption of any alcoholic beverage;

(2) While under the influence of alcohol;

(3) While using any drug that affects such person's faculties in any way contrary to safety; or

(4) While there is 0.04 percent or more by weight of alcohol in his blood.

(b) Any person arrested for violation of this Code section shall, at the request of a law enforcement officer of the state or any political subdivision, be administered a test as provided by and subject to the restrictions of subsection (a) of Code Section 40-6-392.

(c) A person who violates this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined in an amount not to exceed \$2,000.00. (Code 1981, § 6-2-5.1, enacted by Ga. L. 1989, p. 276, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — those charged with a violation are to be fingerprinted. 1989 Op. Att'y Gen. 89-52.
This Code section is an offense for which

6-2-5.2. Homicide by aircraft.

Any person who, without malice aforethought, causes the death of another person through the violation of Code Section 6-2-5.1 commits the offense of homicide by aircraft and, upon conviction thereof, shall be punished by imprisonment for not less than two years nor more than 15 years. (Code 1981, § 6-2-5.2, enacted by Ga. L. 1992, p. 1443, § 1.)

6-2-6. Rules for determination of liability for injury to or death of passengers.

The liability of the operator of an aircraft carrying passengers, for injury to or death of such passengers, shall be determined by the rules of law applicable to torts on land arising out of similar relationships. (Ga. L. 1933, p. 99, § 7; Code 1933, § 11-107.)

Cross references. — Duties of carriers of passengers generally, § 46-9-132.

JUDICIAL DECISIONS

Degree of care owed guest by operator of aircraft. — The rules of law governing the degree of care owed by an operator of aircraft to his guest riding therein are the same as those governing the operator of a motor vehicle under similar circumstances, and in both cases the defendant operator is liable for injuries to his guest only in cases of gross negligence. *Osburn v. Pilgrim*, 246 Ga. 688, 273 S.E.2d 118 (1980).

The duty owed a guest passenger riding by invitation in another's automobile is that of slight care; and the absence of such care is termed gross negligence. *Sammons v. Webb*, 86 Ga. App. 382, 71 S.E.2d 832 (1952).

Defenses of assumption of risk and avoidance of consequences are available to a defendant pilot of an aircraft. *Osburn v. Pilgrim*, 246 Ga. 688, 273 S.E.2d 118 (1980).

Family-purpose doctrine is applicable to aircraft. — Family-purpose doctrine, is to have broad application, and is applicable to aircraft as well as automobiles and watercraft. *Kimbell v. DuBose*, 139 Ga. App. 224, 228 S.E.2d 205 (1976).

Cited in *Newman v. Fleming*, 331 F. Supp. 973 (S.D. Ga. 1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 58, 59, 64 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 142, 250 et seq.

ALR. — Airplane as within terms "vehicle," "motor vehicle," etc., 165 ALR 916.

Death of or injury to occupant of airplane from collision or near collision with another aircraft, 12 ALR2d 677.

Limitation of liability for personal injury by air carrier, 13 ALR2d 337.

Who constitutes member of "crew" of aircraft within clause of aviation accident policy or rider thereto covering injuries to such personnel, 14 ALR2d 1363.

Liability of operator of flight training school for injury or death of trainee, 17 ALR2d 557.

Duty and liability as to preflight inspection and maintenance of aircraft, 30 ALR2d 1172.

Proof, in absence of direct testimony by survivors or eyewitnesses, as to who, among occupants of plane, was piloting it at time of accident, 36 ALR2d 1290.

Duty and liability of carrier with respect to allowing passenger sufficient time for change of vehicles, 40 ALR2d 809.

Employer's liability for negligence of employee in piloting his own airplane in employer's business, 46 ALR2d 1050.

Liability of carrier to passenger injured by hurling of object through window by a third person, 46 ALR2d 1098.

Negligence in operation of airplane on take-off, 74 ALR2d 615.

Negligence in operation of airplane in landing, 74 ALR2d 628.

Liability for injury or damage from taxiing aircraft, 74 ALR2d 654.

Air carrier's liability for injury to passenger from changes in air pressure, 75 ALR2d 848.

Interference with airplane pilot or controls as negligence or contributory negligence, 75 ALR2d 858.

Liability for personal injury or death based on overloading aircraft, 75 ALR2d 868.

Aviation: helicopter accidents, 35 ALR3d 707.

Liability for injury to guest in airplane, 40 ALR3d 1117.

Aviation law: liability of air carrier for injury to, or death of, passenger on charter flight, 41 ALR3d 455; 91 ALR Fed. 547.

Liability for alleged negligence of independent servicer or repairer of aircraft, 41 ALR3d 1320.

Liability of owner or operator of motor vehicle or aircraft for injury or death allegedly resulting from failure to furnish or require use of seat belt, 49 ALR3d 295.

Choice-of-law considerations in application of aviation guest statute, 62 ALR3d 1076.

Constitutionality of automobile and aviation guest statutes, 66 ALR3d 532.

Liability of air carrier for damage or injury sustained by passenger as result of hijacking, 72 ALR3d 1299.

Risks and causes of loss covered or excluded by aviation liability policy, 86 ALR3d 118.

Airport operations liability insurance, 92 ALR3d 1267.

Application of *res ipsa loquitur* doctrine to accident incurred by passenger while boarding or alighting from a carrier, 93 ALR3d 776.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Res ipsa loquitur in aviation accidents, 25 ALR4th 1237.

Liability of land carrier to passenger who becomes victim of third party's assault on or about carrier's vehicle or premises, 34 ALR4th 1054.

Liability of land carrier to passenger who becomes victim of another passenger's assault, 43 ALR4th 189.

Limitation of liability of air carrier for personal injury or death, 91 ALR Fed. 547.

6-2-7. Rules for determination of liability of owners of aircraft for damages caused by collisions.

The liability of the owner of one aircraft to the owner of another aircraft or to pilots on either aircraft for damage caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land. (Ga. L. 1933, p. 99, § 6; Code 1933, § 11-106.)

JUDICIAL DECISIONS

Cited in *Kimbell v. DuBose*, 139 Ga. App. 224, 228 S.E.2d 205 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 58, 59, 64, 65, 92, 93, 94, 98, 117.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 142, 174, 277.

ALR. — Airplane as within terms "vehicle," "motor vehicle," etc., 165 ALR 916.

Res ipsa loquitur in aviation accidents, 6 ALR2d 528.

Death of or injury to occupant of airplane from collision or near collision with another aircraft, 12 ALR2d 677.

Who constitutes member of "crew" of aircraft within clause of aviation accident policy or rider thereto covering injuries to such personnel, 14 ALR2d 1363.

Duty and liability as to preflight inspection and maintenance of aircraft, 30 ALR2d 1172.

Proof, in absence of direct testimony by survivors or eyewitnesses, as to who, among occupants of plane, was piloting it at time of accident, 36 ALR2d 1290.

Employer's liability for negligence of employee in piloting his own airplane in employer's business, 46 ALR2d 1050.

Negligence in operation of airplane on take-off, 74 ALR2d 615.

Negligence in operation of airplane in landing, 74 ALR2d 628.

Liability for injury or damage from taxiing aircraft, 74 ALR2d 654.

Pilot's contributory negligence or assumption of risk as defense in action for his injuries or death resulting from airplane accident, 35 ALR3d 614.

Aviation: helicopter accidents, 35 ALR3d 707.

Choice of law in actions arising from airplane crash in territorial waters of state, 39 ALR3d 196.

Liability for alleged negligence of independent servicer or repairer of aircraft, 41 ALR3d 1320.

Risks and causes of loss covered or excluded by aviation liability policy, 86 ALR3d 118.

Airport operations liability insurance, 92 ALR3d 1267.

Res ipsa loquitur in aviation accidents, 25 ALR4th 1237.

6-2-8. Proof of injury to persons or property on ground deemed prima-facie evidence of negligence.

Proof of injury inflicted to persons or property on the ground by the operation of any aircraft and contact therewith or by objects falling or thrown therefrom shall be prima-facie evidence of negligence on the part of the operator of such aircraft in reference to such injury. (Ga. L. 1933, p. 99, § 5; Code 1933, § 11-105.)

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 118, 119.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, § 154.

ALR. — Res ipsa loquitur in aviation accidents, 6 ALR2d 528.

Defenses of fellow servant and assumption of risk in actions involving injury or death of member of airplane crew, ground crew, or mechanic, 13 ALR2d 1137.

Duty and liability as to preflight inspection and maintenance of aircraft, 30 ALR2d 1172.

Liability of air carrier to passenger injured while boarding or alighting, 61 ALR2d 1113.

Liability of municipality for torts in connection with airport, 66 ALR2d 634.

Negligence in operation of airplane on take-off, 74 ALR2d 615.

Negligence in operation of airplane in landing, 74 ALR2d 628.

Liability for injury or damage from taxiing aircraft, 74 ALR2d 654.

Statute imposing strict liability on aircraft owner as affecting liability under Federal Tort Claims Act, 74 ALR2d 867.

Pilot's contributory negligence or assumption of risk as defense in action for his injuries or death resulting from airplane accident, 35 ALR3d 614.

Aviation: helicopter accidents, 35 ALR3d 707.

Risks and causes of loss covered or excluded by aviation liability policy, 86 ALR3d 118.

Validity, construction, and application of state criminal statute prohibiting reckless operation of aircraft, 89 ALR3d 893.

Airport operations liability insurance, 92 ALR3d 1267.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Res ipsa loquitur in aviation accidents, 25 ALR4th 1237.

6-2-9. Requirements as to licensing of aircraft.

Since the public safety requires, and the advantages of uniform regulation make it desirable in the interest of aeronautical progress, that aircraft operating within the state should conform, with respect to design, construction, and airworthiness, to the standards prescribed by the federal government with respect to navigation of civil aircraft subject to its jurisdiction, it shall be unlawful for any person to operate or navigate any aircraft unless such aircraft has an appropriate effective license issued by the Federal Aviation Administration and is registered by the Federal Aviation Administration; provided, however, that this restriction shall not apply to military aircraft of the United States or possessions thereof, to public aircraft of any state or territory, or to aircraft licensed by a foreign country with which the United States has a reciprocal agreement covering the operation of such licensed aircraft. (Ga. L. 1933, p. 99, § 2; Code 1933, § 11-102.)

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 12, 22, 23, 133.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 40-44.

ALR. — Aircraft operated wholly within state as subject to federal regulation, 9 ALR2d 485.

Duty of airplane owner or operator to furnish aircraft with navigational and flight safety devices, 50 ALR2d 898.

Products liability: modern cases determining whether product is defectively designed, 96 ALR3d 22.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

6-2-10. Requirements as to licensing of pilots.

Since the public safety requires, and the advantages of uniform regulation make it desirable in the interest of aeronautical progress, that a person engaging in navigating or operating aircraft in any form of navigation shall have the qualifications necessary for obtaining and holding a pilot's license issued by the Federal Aviation Administration, it shall be unlawful for any person to operate or navigate any aircraft unless such person is the holder of an appropriate effective pilot's license or permit issued by the Federal Aviation Administration; provided, however, that this restriction shall not apply to those persons operating military aircraft of the United States or possessions thereof, or operating public aircraft of any state or territory, or operating any aircraft licensed by a foreign country with which the United States has a reciprocal agreement covering the operation of such licensed aircraft. (Ga. L. 1933, p. 99, § 3; Code 1933, § 11-103.)

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 33-37.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 43-51.

ALR. — Aircraft operated wholly within

state as subject to federal regulation, 9 ALR2d 485.

Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

6-2-11. Possession and display of licenses.

The certificate of the license required for pilots shall be kept in the personal possession of the licensee when he is operating aircraft; the certificate of the license required for aircraft shall be kept in the aircraft at all times when the aircraft is being used; and either or both of the certificates must be presented for inspection upon the demand of any passenger, any peace officer, or any official, manager, or person in charge of any airport or landing field upon which the pilot or aircraft shall land. (Ga. L. 1933, p. 99, § 4; Code 1933, § 11-104.)

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 18, 34, 35. **C.J.S.** — 2A C.J.S., Aeronautics and Aerospace, §§ 43-51.

6-2-12. Penalty for violation of provisions of chapter.

Any person violating any provision of this chapter shall be guilty of a misdemeanor. (Ga. L. 1933, p. 99, § 10; Code 1933, § 11-9901.)

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state criminal statute prohibiting reckless operation of aircraft, 89 ALR3d 893.

CHAPTER 3

POWERS OF LOCAL GOVERNMENTS AS TO AIR FACILITIES

Article 1		Sec.	
General Provisions		6-3-22.1.	Acquisition of property outside territorial boundaries [Repealed].
Sec. 6-3-1.	Construction and maintenance of air facilities by Department of Transportation.	6-3-23.	Payment of costs of acquisition of property for airports or landing fields.
Article 2		6-3-24.	Appropriation of funds for development, operation, maintenance, or control of air facilities.
Powers of Local Governments as to Air Facilities		6-3-25.	Powers and duties of counties, municipalities, and political subdivisions as to airports generally.
6-3-20.	Acquisition, construction, maintenance, and control of airports and landing fields by local governments authorized.	6-3-26.	Powers and duties of counties, municipalities, and political subdivisions as to airports generally — Acquisition of rights and easements for radios, lights, markers, and other equipment.
6-3-20.1.	Management, ownership, or control of airports by foreign citizens or businesses with substantial foreign ownership prohibited.	6-3-27.	Powers and duties of counties, municipalities, and political subdivisions as to airports generally — Enforcement of police regulations.
6-3-21.	Lands acquired, owned, leased, controlled, or occupied by local governments deemed for public purposes; effect on ad valorem taxation.	6-3-28.	Construction of article.
6-3-22.	Methods of acquisition of property for airports and landing fields.		

JUDICIAL DECISIONS

Broad powers conferred. — This chapter is a general law and confers broad and comprehensive powers upon municipalities, counties, and other political subdivisions, to acquire (either separately or jointly) lands for construction and expansion of airports. *City of Atlanta v. Murphy*, 206 Ga. 21, 55 S.E.2d 573 (1949).

Chapter to become part of charter of all municipalities. — This chapter applies to all municipalities, counties, and other political subdivisions of state, and would, in effect, become a part of charter of all municipalities of state. *City of Atlanta v. Airways Parking Co.*, 225 Ga. 173, 167 S.E.2d 145 (1969).

No cause of action stated where no showing of arbitrary abuse of powers. — A petition by residents and taxpayers for injunction, which shows that closing and relocation of a section of state highway is for purpose of extending a municipal airport, fails to state a cause of action, where arbitrary abuse of powers granted by this chapter is not shown. *City of Atlanta v. Murphy*, 206 Ga. 21, 55 S.E.2d 573 (1949).

Cited in *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934); *Miree v. United States*, 526 F.2d 679 (5th Cir. 1976); *Southern Airways, Inc. v. City of Atlanta*, 428 F. Supp. 1010 (N.D. Ga. 1977).

RESEARCH REFERENCES

ALR. — Air navigation, 69 ALR 316.

Power to establish or maintain public airport, or to create separate public airport authority, 161 ALR 733.

Validity, construction, and operation of

airport operator's grant of exclusive or discriminatory privilege or concession, 40 ALR2d 1060.

Liability of municipality for torts in connection with airport, 66 ALR2d 634.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Establishment and operation of bank offices and facilities within primary airport terminal facilities at

municipal or county airport, § 7-1-602. Airport firefighters, § 25-4-30 et seq.

6-3-1. Construction and maintenance of air facilities by Department of Transportation.

(a) The Department of Transportation is authorized and empowered to construct and maintain airports, landing fields, air navigation facilities, and lighting and lighting fixtures and to contract with the counties and municipalities of the state for the construction and maintenance of such airports, landing fields, air navigation facilities, and lighting and lighting fixtures, all in accordance with the Federal Aviation Administration's specifications, regulations of the federal government, and upon such terms and conditions as the Department of Transportation may determine.

(b) The State Transportation Board is given the right of eminent domain to acquire sites for such airports, landing fields, and air navigation facilities. (Ga. L. 1941, p. 237, § 2; Ga. L. 1965, p. 449, § 1; Ga. L. 1972, p. 1015, § 2004.)

Cross references. — Department of Transportation aid for airport development,

§ 32-9-7. Licensing of airports by Department of Transportation, § 32-9-8.

OPINIONS OF THE ATTORNEY GENERAL

Funding requires specific legislative appropriation. — The Department of Transportation is authorized to construct and maintain airports, but use of funds for that purpose, unless specifically appropriated by the Legislature, would be unconstitutional. 1962 Op. Att'y Gen. p. 267.

Funding by motor fuel revenue. — Motor fuel revenue cannot be used for purpose of entering into contract with local political

subdivision for installation of navigational aid equipment at local airport. 1967 Op. Att'y Gen. No. 67-461.

Leasing or permitting use of facilities by private individuals. — No authority is provided in this section for Highway Department (now Department of Transportation) to grant lease to or permit use of airport facilities by private individuals. 1970 Op. Att'y Gen. No. 70-98.

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 47, 50, 53, 57. 26 Am. Jur. 2d, Eminent Domain, § 162.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 9, 73. 29A C.J.S., Eminent Domain, § 62.

ARTICLE 2

POWERS OF LOCAL GOVERNMENTS AS TO AIR FACILITIES

JUDICIAL DECISIONS

Constitutionality of article. — See Swoger v. Glynn County, 179 Ga. 768, 177 S.E. 723 (1934).

6-3-20. Acquisition, construction, maintenance, and control of airports and landing fields by local governments authorized.

(a) Counties, municipalities, and other political subdivisions are authorized, separately or jointly, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such counties, municipalities, and other political subdivisions, and may use for such purpose or purposes any available property that is owned or controlled by such counties, municipalities, or other political subdivisions.

(b) All counties in the State of Georgia which are located on the boundary line between the State of Georgia and any other state, as well as all municipalities and other political subdivisions which are located in such boundary counties, are authorized, separately, jointly with each other, or jointly with any county, municipality, or political subdivision of any such border state, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such border counties and the municipalities and other political subdivisions therein contained in the State of Georgia or within the geographical limits of any county, municipality, or political subdivision of any such border state other than the State of Georgia. (Ga. L. 1933, p. 102, § 1; Code 1933, § 11-201; Ga. L. 1941, p. 380, § 1.)

Cross references. — Regulation and taxation of sale, storage, etc., of alcoholic beverages at county and municipal airports, § 3-8-1. Sale of distilled spirits, malt beverages, and wine by airline passenger carriers, §§ 3-9-1, 3-9-2.

Law reviews. — For article discussing extraterritorial condemnation of property by municipalities, see 12 Ga. L. Rev. 1 (1977).

For comment on *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940), see 3 Ga. B.J. 57 (1940).

JUDICIAL DECISIONS

"Airports and landing fields." — The language of this section, "airports and landing fields," encompasses all property reasonably and uniformly used for public convenience and welfare to facilitate effective operation of the air transportation facility. *Clayton County Bd. of Tax Assessors v. City of Atlanta*, 164 Ga. App. 864, 298 S.E.2d 544 (1982).

Territorial jurisdiction conferred upon municipalities. — This article vests in each municipality the same general authority, that is, each is given power to condemn land within and without its boundaries, and accordingly each is by terms of statute vested with jurisdiction over every part of state, including territory within limits of every other municipality. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940).

Grant of power to municipalities to condemn property within and without their geographical limits authorizes one municipality to condemn land within territorial limits of another municipality. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940).

This article authorizes municipalities to condemn land beyond their limits for establishment or expansion of airports and landing fields. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940).

While the article *prima facie* empowers one municipality to condemn land within another municipality, it does not follow that a municipality in one part of state would have right to establish airport in a municipality in a distant part of the state. This would manifestly be an abuse of power

granted; which would be enjoined by courts. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940).

Effect of condemnation by municipality. — If condemning municipality acts in good faith within power granted under terms of statute, and there is a reasonable necessity for appropriation of property, fact that other municipality may be deprived of right to tax or police property so taken is merely express result of exercise of power so granted, and does not constitute reason why act should be construed as denying the power. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940).

Airports characterized as governmental institutions. — This chapter invested airports of the state with the character of governmental institutions. *Mayor of Savannah v. Lyons*, 54 Ga. App. 661, 189 S.E. 63 (1936).

Airport of City of Savannah was characterized under statutes (both local and general) authorizing its establishment and maintenance as a governmental institution in nature of a park and the city was not liable in damages to party sustaining personal injuries by reason of dangerous defect in pavement of a roadway inside of park, notwithstanding receipt by city of some incidental revenue from lessees or licensees of certain privileges therein, it not appearing that airport was operated primarily as a source of revenue. *Mayor of Savannah v. Lyons*, 54 Ga. App. 661, 189 S.E. 63 (1936).

Cited in *Caroway v. City of Atlanta*, 85 Ga. App. 792, 70 S.E.2d 126 (1952); *City of Macon v. Powell*, 133 Ga. App. 907, 213 S.E.2d 63 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 51-59.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 61-69.

ALR. — Aeroplanes and aeronautics, 99 ALR 173.

Power to establish or maintain public air-

port, or to create separate public airport authority, 161 ALR 733.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Air carrier's liability for injury from condition of airport premises, 14 ALR5th 662.

6-3-20.1. Management, ownership, or control of airports by foreign citizens or businesses with substantial foreign ownership prohibited.

(a) As used in this Code section, the term:

(1) "Airport" means the real and personal property constituting an airport as a complete entity or unit, and the management, operation, or control of an airport means the overall management, operation, or control of the airport as a complete entity or unit.

(2) "Business entity with a substantial foreign ownership" means any business entity in which 25 percent or more of the equity in such business entity is owned by persons or other business entities that are not citizens of the United States.

(3) "Citizen of the United States" means any individual person who is a citizen of the United States and any business entity incorporated or having its principal place of business in the United States, but the term shall not include any business entity with a substantial foreign ownership.

(4) "Person" means an individual person.

(b) No county, municipality, or other political subdivision and no public authority owning or controlling an airport shall sell, lease, or otherwise contract with any person or business entity which is not a citizen of the United States or with any business entity with a substantial foreign ownership to have such person or business entity manage, operate, own, or control such airport.

(c) The provisions of subsection (b) of this Code section shall not prevent or be construed to prevent any person who is not a citizen of the United States or any business entity with a substantial foreign ownership from leasing or purchasing portions of any airport for the purpose of conducting such person's or entity's lawful business thereon or from leasing or subleasing portions of any airport for the purpose of allowing any other such person or entity to conduct its lawful business thereon. (Code 1981, § 6-3-20.1, enacted by Ga. L. 1988, p. 1845, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, the comma was deleted following "entity's lawful business thereon" near the end of subsection (c).

6-3-21. Lands acquired, owned, leased, controlled, or occupied by local governments deemed for public purposes; effect on ad valorem taxation.

Any lands acquired, owned, leased, controlled, or occupied by counties, municipalities, or other political subdivisions for the purpose or purposes enumerated in Code Section 6-3-20 shall be and are declared to be acquired, owned, leased, controlled, or occupied for public, governmental, and municipal purposes; provided, however, that with respect to facilities

located on such lands, which lands are located outside of the territorial limits of the political subdivision that leases such lands and which are leased to, controlled, or occupied by private parties, the interests created in such private parties, for the purpose of ad valorem taxation only, are declared not to be used for public, governmental, or municipal purposes and said resulting interests, regardless of the extent of such interest, whether possessory or an estate in land, are subject to ad valorem taxation; provided, further, that the underlying fee interest in such property which remains vested in the county, municipality, or other political subdivision shall be deemed to be used for public, governmental, and municipal purposes. The municipality's interest in lands and the facilities located thereon located inside the territorial limits of a municipality which are owned by that municipality for the purposes enumerated in Code Section 6-3-20, are declared to be used for public, governmental, or municipal purposes and are not subject to ad valorem taxation. (Ga. L. 1933, p. 102, § 2; Code 1933, § 11-202; Ga. L. 1983, p. 647, § 1; Ga. L. 1985, p. 1649, § 1.)

JUDICIAL DECISIONS

Airports of state are invested with character of governmental institutions by this article. *Mayor of Savannah v. Lyons*, 54 Ga. App. 661, 189 S.E. 63 (1936).

Lease of county property for use as airport is proprietary function. — Where a county through its proper authority leases property which it owns for use as an airport, it is engaging in a proprietary and not a governmental function. *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Binding nature of county's contract with private parties for operating airport. — A county owning an airport may properly contract with private parties for operating it, in whole or in part. In so doing, the governing authority of the county is engaged in a proprietary function and may, by such contract, bind its successors in office for a period of years. *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Section not intended to totally immunize municipalities from suit. — This section, which provides that lands acquired, controlled, or occupied as landing fields for the use of aircraft shall be so acquired or controlled for public, governmental, and municipal purposes, was intended to be a declaration on the part of the Legislature of the public purpose as to which the authorization was given, and not as a limitation immuniz-

ing such municipalities from suit regardless of circumstances. *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Tort liability of municipality operating airport. — Municipality operating an airport under this article is engaged in a proprietary function and is liable for tortious acts of its servants and agents in operation of airport from which substantial revenue is derived. *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Airport of City of Savannah was characterized under statutes (both local and general) authorizing its establishment and maintenance as a governmental institution in nature of a park and city was not liable in damages to party sustaining personal injuries by reason of dangerous defect in pavement of a roadway inside of park, notwithstanding receipt by city of some incidental revenue from lessees or licensees of certain privileges therein, it not appearing that airport was operated primarily as a source of revenue. *Mayor of Savannah v. Lyons*, 54 Ga. App. 661, 189 S.E. 63 (1936).

Lease of airport property to corporation. — Airport property leased to corporation, which was used for provision of inflight meals, was subject to taxation where provisions of lease did not preserve the public's "rightful, equal, and uniform use" of the property as required by § 6-3-25. *Clayton*

County Bd. of Tax Assessors v. City of Atlanta, 164 Ga. App. 864, 298 S.E.2d 544 (1982).

Airline's property in hangar on political subdivision's property. — Usufructs in hangar property and fuel tanks used by an airline were not subject to ad valorem taxes where the property taxed was owned by a political subdivision and located within that same political subdivision. *Roberts v. Eastern Airlines*, 257 Ga. 273, 357 S.E.2d 585 (1987).

Cited in *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940); *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E.2d 245 (1942); *Caroway v. City of Atlanta*, 85 Ga. App. 792, 70 S.E.2d 126 (1952); *Southern Airways Co. v. De Kalb County*, 216 Ga. 358, 116 S.E.2d 602 (1960); *City of Macon v. Powell*, 133 Ga. App. 907, 213 S.E.2d 63 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 51-59.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 61-69.

ALR. — Air carrier's liability for injury from condition of airport premises, 14 ALR5th 662.

6-3-22. Methods of acquisition of property for airports and landing fields.

Private property needed by a county, municipality, or other political subdivision for an airport or landing field or for the expansion of an airport or landing field may be acquired by grant, purchase, lease, or other means, if such county, municipality, or other political subdivision is able to agree with the owners of the property on the terms of such acquisition, and otherwise by condemnation in the manner provided by the law under which the county, municipality, or other political subdivision is authorized to acquire real property for public purposes; provided, however, that the power of condemnation may be exercised extraterritorially only with the consent of the governing authority of the county, municipality, or other political subdivision wherein the property is located, as expressed either in a resolution adopted by such governing authority, granting its consent to such condemnation, or by failure of such governing authority to adopt a resolution denying its consent to such condemnation within 60 days from the receipt of a resolution from the proposed condemnor requesting approval of such condemnation, or with the consent of the General Assembly, as expressed in a resolution enacted by the General Assembly, after denial of consent to such condemnation by the governing authority of the county, municipality, or other political subdivision wherein the property is located; provided, however, that for any proposed airport or airport expansion by a city into a county where such city is located, or by a county into a city located in such county, the decision of the governing body of the jurisdiction into which such proposed airport or airport expansion is to be located shall be final as to whether or not such power of condemnation may be exercised extraterritorially. (Ga. L. 1933, p. 102, § 3; Code 1933, § 11-203; Ga. L. 1992, p. 1434, § 1.)

Law reviews. — For note discussing the relation of airport zoning to the constitutional provision requiring just compensation for a taking of property, see 10 Ga. L. Rev.

218 (1975). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 149 (1992).

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Section authorizes condemnation of “private property” whether real or personal, for airport expansion. *City of Atlanta v. Airways Parking Co.*, 225 Ga. 173, 167 S.E.2d 145 (1969).

Territorial scope of condemnation power of municipalities. — This article authorizes municipalities to condemn land beyond their limits for establishment or expansion of airports and landing fields. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940).

This article vests in each municipality the same general authority, that is, each is given the power to condemn land within and without its boundaries, and accordingly each is by the terms of the article vested with jurisdiction over every part of the state, including the territory within the limits of every other municipality. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940).

The grant of power to municipalities to condemn property within and without their geographical limits authorizes one municipality to condemn land within territorial limits of another municipality. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940).

While this article *prima facie* empowers one municipality to condemn land within

another municipality, it does not follow that a municipality in one part of state would have right to establish airport in a municipality in a distant part of the state. This would manifestly be an abuse of power granted, which would be enjoined by courts. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940).

Effect of condemnation by municipality. — If condemning municipality acts in good faith within power granted under terms of this article, and there is a reasonable necessity for appropriation of property, fact that other municipality may be deprived of right to tax or police property so taken is merely express result of exercise of power so granted, and does not constitute reason why the article should be construed as denying the power. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940).

Delegation of condemnation authority. — Counties and municipalities have authority to condemn private property for airports and delegation of that authority to an office building authority was authorized. *Savage v. Thomaston-Upson County Office Bldg. Auth.*, 205 Ga. App. 634, 422 S.E.2d 896, cert. denied, 205 Ga. App. 901, 422 S.E.2d 896 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 47, 50, 53, 57. 26 Am. Jur. 2d, Eminent Domain, § 162.

C.J.S. — 2A C.J.S., Aeronautics and Aero-

space, §§ 9, 73. 29A C.J.S., Eminent Domain, § 62.

ALR. — Exercise of eminent domain for purposes of airport, 135 ALR 755.

6-3-22.1. Acquisition of property outside territorial boundaries.

Repealed by Ga. L. 1991, p. 953, § 1, effective July 1, 1992.

Editor's notes. — This Code section was based on Code 1981, § 6-3-22.1, enacted by Ga. L. 1991, p. 953, § 1.

6-3-23. Payment of costs of acquisition of property for airports or landing fields.

Costs of acquisition of real property, in accordance with this article, for an airport or landing field may be paid for by appropriation of moneys available therefor or wholly or partly from the proceeds of the sale of bonds of the county, municipality, or other political subdivision, as the legislative body of such political subdivision shall determine; subject however, to the adoption of a proposition therefor at a regular or special election, if the adoption of such a proposition is a prerequisite to the issuance of bonds of such county, municipality, or other political subdivision for public purposes generally. (Ga. L. 1933, p. 102, § 4; Code 1933, § 11-204.)

6-3-24. Appropriation of funds for development, operation, maintenance, or control of air facilities.

The local public authorities having power to appropriate moneys within the counties, municipalities, or other public subdivisions acquiring, establishing, developing, operating, maintaining, or controlling airports or landing fields under this article are authorized to appropriate and cause to be raised, by taxation or otherwise, in such counties, municipalities, or other political subdivisions, moneys sufficient to carry out therein the provisions of this article and to use for such purpose or purposes moneys derived from said airports or landing fields. (Ga. L. 1933, p. 102, § 6; Code 1933, § 11-206.)

6-3-25. Powers and duties of counties, municipalities, and political subdivisions as to airports generally.

Counties, municipalities, or other political subdivisions which establish airports or landing fields or which acquire, lease, or set apart real property for such purpose or purposes are authorized to:

(1) Construct, equip, improve, maintain, and operate the same or vest authority for the construction, equipment, improvement, maintenance, and operation thereof in an officer, board, or body of the county, municipality, or other political subdivision. The expense of such construction, equipment, improvement, maintenance, and operation shall be a responsibility of the county, municipality, or other political subdivision;

(2) Adopt regulations and establish charges, fees, and tolls for the use of such airports or landing fields, fix penalties for the violation of said regulations, and establish liens to enforce payment of said charges, fees, and tolls, subject to existing contracts;

(3) Lease such airports or landing fields to private parties for operation or lease or assign to private parties for operation, space, area,

improvements, and equipment on such airports or landing fields, provided in each case that in so doing the public is not deprived of its rightful, equal, and uniform use thereof; and

(4) Lease portions of such property lying within any county having a population of 550,000 or more persons according to the United States decennial census of 1980 or any future such census for an initial term of up to 50 years, and to extend such leases, to private parties for development of such property for hotels and related facilities, conference centers, office buildings, commercial and retail uses, and other similar airport and travel related purposes, provided that:

(A) A lease under this paragraph shall expressly grant and convey to the lessee a taxable estate for years in both the property and any improvements upon such property as may be constructed and shall not grant or convey a nontaxable usufruct in either the property or the improvements upon such property; and

(B) The leasing authority granted under this paragraph shall not extend to property acquired for airport noise mitigation purposes pursuant to the former Airport and Airway Development Act of 1970 (49 U.S.C. Section 1701, et seq.), as amended, or the Airport and Airway Improvement Act of 1982 (49 U.S.C. Section 2201, et seq.), as amended. (Ga. L. 1933, p. 102, § 5; Code 1933, § 11-205; Ga. L. 1987, p. 631, § 1.)

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“Airports and landing fields.” — The language of this section, “airports and landing fields”, encompasses all property reasonably and uniformly used for public convenience and welfare to facilitate effective operation of the air transportation facility. *Clayton County Bd. of Tax Assessors v. City of Atlanta*, 164 Ga. App. 864, 298 S.E.2d 544 (1982).

Lease to private corporation. — Airport property leased to corporation, which was used for provision of inflight meals, was subject to taxation where provisions of lease did not preserve the public’s “rightful, equal, and uniform use” of the property as required by this section. *Clayton County Bd. of Tax Assessors v. City of Atlanta*, 164 Ga. App. 864, 298 S.E.2d 544 (1982).

County subject to suit for breach or interference with performance. — Under this article, which expressly extends its coverage to counties, the county owning an airport is authorized to contract with private party for its operation; the logical inverse inference of

the article is that to extent county is authorized to contract, it also may be sued upon contract for breach or for interference with performance. *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Binding nature of county’s contract with private parties for operating airport. — A county owning an airport may properly contract with private parties for its operation, in whole or in part. In so doing, governing authority of county is engaged in a proprietary function and may, by such contract, bind its successors in office for a period of years. *Southern Airways Co. v. DeKalb County*, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Fulton County is not excused from accepting performance from a bankruptcy trustee’s assignee, despite this section, which authorizes counties to establish airports and to lease such airports, and *Fulton County Code*, § 29-3-74(i), which provides that “[l]eases may be assigned or sublet to qual-

ified fixed base operators only with the approval of the Fulton County Commission.” *Abney v. Fulton County* (In re Fulton Air Serv., Inc.), 34 Bankr. 568 (Bankr. N.D. Ga. 1983).

Cited in *Caroway v. City of Atlanta*, 85 Ga. App. 792, 70 S.E.2d 126 (1962).

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City or county cannot create an authority to control and operate airport under this section. — While this section authorizes cities and counties to construct, maintain, and operate airports or to vest such authority

in an officer, board, or body of such political subdivision, the section does not authorize a city or county to create an authority to control and operate its airport. 1960-61 Op. Att’y Gen. p. 13.

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 51-59.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 61-69.

6-3-26. Powers and duties of counties, municipalities, and political subdivisions as to airports generally — Acquisition of rights and easements for radios, lights, markers, and other equipment.

Counties, municipalities, and other political subdivisions are authorized to acquire the right or easement for a term of years, or perpetually, to place and maintain radio and other equipment, and suitable marks for the daytime, and to place, operate, and maintain suitable lights for the nighttime marking of buildings, or other structures or obstructions, for the safe operation of aircraft utilizing airports and landing fields acquired or maintained under this article. Such rights or easements may be acquired by grant, purchase, lease, or condemnation in the same manner as is provided in Code Section 6-3-22 for the acquisition of the airport or landing field itself or the expansion thereof. (Ga. L. 1933, p. 102, § 7; Code 1933, § 11-207.)

RESEARCH REFERENCES

ALR. — Airport operator’s rights and remedies as to uses of adjoining land inter-

fering with aircraft operation, 25 ALR2d 1454.

6-3-27. Powers and duties of counties, municipalities, and political subdivisions as to airports generally — Enforcement of police regulations.

Counties, municipalities, or other political subdivisions acquiring, establishing, developing, operating, maintaining, or controlling airports or landing fields under this article without the geographical limits of such subdivisions are specifically granted the right to enforce police regulations

on such airports or landing fields. (Ga. L. 1933, p. 102, § 8; Code 1933, § 11-208.)

Cross references. — Regulation and taxation of sale, storage, etc., of alcoholic beverages at county and municipal airports, § 3-8-1. Sale of distilled spirits, malt beverages, and wine by airline passenger carriers, §§ 3-9-1, 3-9-2.

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Cited in Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 51-59.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 61-69.

6-3-28. Construction of article.

It is the intent and purpose of this article that all provisions relating to the issuance of bonds and the levying of taxes for airport purposes and the condemnation for airports and airport facilities shall be construed in accordance with general provisions of the law governing the right and procedure of municipalities to condemn, issue bonds, levy taxes, etc. (Ga. L. 1933, p. 102, § 9; Code 1933, § 11-209.)

CHAPTER 4

GEORGIA AIRPORT DEVELOPMENT AUTHORITY

Sec.		Sec.	
6-4-1.	(For effective date, see note) Short title.	6-4-9.	(For effective date, see note) Additional provisions governing issuance of bonds, notes, or other obligations.
6-4-2.	(For effective date, see note) Authority created; purposes.	6-4-10.	(For effective date, see note) Development of air transportation projects.
6-4-3.	(For effective date, see note) Definitions.	6-4-11.	(For effective date, see note) Liberal construction of chapter.
6-4-4.	(For effective date, see note) Corporate existence; status as political subdivision.	6-4-12.	(For effective date, see note) Obligations or indebtedness not to constitute indebtedness of state or political subdivisions.
6-4-5.	(For effective date, see note) Appointment of members; terms; filling of vacancies; officers; quorum; reimbursement for expenses; compensation of employees; legal services.	6-4-13.	(For effective date, see note) Tax exemption.
6-4-6.	(For effective date, see note) Members accountable as trustees; conflict of interests; books and records.	6-4-14.	(For effective date, see note) Police powers.
6-4-7.	(For effective date, see note) General powers.	6-4-15.	(For effective date, see note) Other authorities unaffected by provisions of chapter.
6-4-8.	(For effective date, see note) Requirements for issuance of revenue bonds, notes, or other obligations.	6-4-16.	(For effective date, see note) Venue and jurisdiction of actions.

Effective date. — Ga. L. 1992, p. 1615, § 2, provided that this chapter became effective April 15, 1992.

Ga. L. 1992, p. 1615, § 3, not codified by the General Assembly, provides: "This Act shall not be effective until such time as the

'State Airport System Plan' has been completed by the Department of Transportation."

Law reviews. — For note on 1992 amendment of this Code chapter, see 9 Ga. St. U.L. Rev. 149 (1992).

6-4-1. (For effective date, see note) Short title.

This chapter shall be known and may be cited as the "Georgia Airport Development Authority Law." (Code 1981, § 6-4-1, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-2. (For effective date, see note) Authority created; purposes.

There is created the Georgia Airport Development Authority for the purposes of determination of location, construction, financing, acquisition of property, operation, and development of any new airports that are planned to accommodate aircraft operating under the provisions of 14 C.F.R. Part 121 within and outside the State of Georgia. (Code 1981, § 6-4-2, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-3. (For effective date, see note) Definitions.

As used in this chapter, the term:

- (1) “Authority” means the Georgia Airport Development Authority.
- (2) “Cost of the project” or “cost of any project” means and shall include: all costs of acquisition, by purchase or otherwise, construction, assembly, installation, or the subsequent modification, renovation, or rehabilitation incurred in connection with any project or any part of any project; the cost of all lands, properties, rights, easements, fees, franchises, permits, approvals, licenses, and certifications acquired; the cost of all machinery and equipment necessary for the operation of the project; financing charges; interest prior to and during construction and for such period of time after completion of construction as shall be deemed necessary to allow the earnings of the project to become sufficient to meet the requirements of the bond issue; the cost of engineering, legal expenses, plans and specifications, and other expenses necessary or incident to determining the feasibility or practicability of the project; administrative expenses; and such other expenses as may be necessary or incident to the financing authorized in this chapter; the construction of any project, and the placing of same in operation. Any obligation or expense incurred for any of the foregoing purposes shall be regarded as a part of the cost of the project and may be paid or reimbursed as such out of the proceeds of revenue bonds issued for such project under this chapter.
- (3) “Governing body” means the elected or duly appointed officials constituting the governing authority of the State of Georgia.
- (4) “Project” means the construction, installation, operation, or lease of any new airports in the state that are planned to be certificated under 14 C.F.R. Part 139 or any appurtenance thereto or the subsequent renovation or rehabilitation of such facility. A project may also include any fixtures, machinery, or equipment used on or in connection with any airport facilities.

(5) “Revenue bonds” and “bonds” means any bonds of the authority which are authorized to be issued under the Constitution and laws of the State of Georgia, including refunding bonds but not including notes or other obligations of an authority.

(6) “Self-liquidating” means that, in the judgment of the authority, the revenues and earnings to be derived by the authority from any project or combination of projects, together with any maintenance, repair, operational services, funds, rights of way, engineering services, and any other in-kind services to be received by the authority from appropriations of the General Assembly, other state agencies or authorities, the United States government, or any county or municipality shall be sufficient to provide for the maintenance, repair, and operation and to pay the principal and interest of revenue bonds which may be issued for the cost of such project, projects, or combination of projects.

(7) “Service area” means the geographical area of operations of the authority and shall consist of the State of Georgia and, with the consent of the appropriate governing authorities thereof, nearby states. (Code 1981, § 6-4-3, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-4. (For effective date, see note) Corporate existence; status as political subdivision.

The Georgia Airport Development Authority shall continue to be a body corporate and politic and an instrumentality and public corporation of the state known as the “Georgia Airport Development Authority.” It shall have perpetual existence. In said name it may contract and be contracted with, sue and be sued, implead and be impleaded, and complain and defend in all courts of this state, subject to the limitations of Code Section 6-4-15. The authority shall constitute a political subdivision within the meaning of Code Section 6-3-22 as enacted by the Georgia General Assembly in its 1992 regular session in Senate Bill 173. (Code 1981, § 6-4-4, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-5. (For effective date, see note) Appointment of members; terms; filling of vacancies; officers; quorum; reimbursement for expenses; compensation of employees; legal services.

(a) The authority shall consist of eight members as follows:

(1) Five members to be appointed by the Governor, at least three of whom shall have expertise in the field of aviation;

(2) One member to be appointed by the Speaker of the House of Representatives, who shall not be a member of the General Assembly;

(3) One member to be appointed by the President of the Senate, who shall not be a member of the General Assembly; and

(4) The commissioner of transportation, who shall serve as chairman.

Two members appointed by the Governor and the members appointed by the Speaker of the House of Representatives and the President of the Senate shall serve for initial terms of two years and until their successors are appointed and qualified. The remaining members appointed by the Governor shall serve for initial terms of four years and until their successors are appointed and qualified. Thereafter, all members shall serve for terms of four years and until their successors are appointed and qualified. Any vacancy among the members so appointed, whether caused by expiration of term, death, resignation, or otherwise, shall be filled in the same manner as the membership position so vacated was last regularly filled. When the vacancy occurs other than by expiration of term, it shall be filled for the unexpired term and until a successor is appointed and qualified.

(b) The authority shall elect a secretary and a treasurer, who need not necessarily be members of the authority. A majority of the members of the authority shall constitute a quorum necessary for the transaction of business, and a majority vote of those present at any meeting at which there is a quorum shall be sufficient to do and perform any action permitted to the authority by this chapter. The chairman shall vote only in the event of a tie.

(c) No vacancy on the authority shall impair the right of the quorum to transact any and all business as stated in this Code section. If any member of the authority has any pecuniary interest in a project, the fact of such interest shall be disclosed by such member and recorded in the minutes of the authority. The member shall abstain from urging the approval of or voting on any project in which the member has a pecuniary interest.

(d) The members of the authority shall receive no compensation for their services but all members shall be entitled to the expense allowance and travel cost reimbursement provided for members of certain boards and commissions pursuant to Code Section 45-7-21 while in the performance of their duties. Employees of the authority shall receive reasonable compensation for their services, the amount to be determined by the members of the authority.

(e) The Attorney General shall provide legal services for the authority. In connection therewith, Code Sections 45-15-13 through 45-15-16 shall be fully applicable. (Code 1981, § 6-4-5, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-6. (For effective date, see note) Members accountable as trustees; conflict of interests; books and records.

(a) The members of the authority shall be accountable in all respects as trustees.

(b) Every member of the authority and every employee of the authority who knowingly has any interest, direct or indirect, in any contract to which the authority is or is about to become a party, or in any other business of the authority, or in any firm or corporation doing business with the authority, shall make full disclosure of such interest to the authority. Failure to disclose such an interest shall constitute cause for which an authority member may be removed or an employee discharged or otherwise disciplined at the discretion of the authority.

(c) Provisions of Article 1 of Chapter 10 of Title 16 and Code Sections 16-10-21 and 16-10-22, regulating the conduct of officers, employees, and agents of political subdivisions, municipal and other public corporations, and other public organizations, shall be applicable to the conduct of members, officers, employees, and agents of the authority.

(d) Any contract or transaction of the authority involving a conflict of interest not disclosed under subsection (b) of this Code section, or involving a violation of Article 1 of Chapter 10 of Title 16 and Code Sections 16-10-21 and 16-10-22, or involving a violation of any other provision of law regulating conflicts of interest which is applicable to the authority or its members, officers, or employees shall be voidable by the authority.

(e) The authority shall keep suitable and proper books and records of all receipts, income, and expenditures of every kind and shall submit for inspection all of such books, together with a proper statement of the authority's financial position, on or about December 31 of each year, to the state auditor. (Code 1981, § 6-4-6, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-7. (For effective date, see note) General powers.

The authority shall have all of the powers necessary, proper, or convenient to carry out and effectuate the purposes and provisions of this chapter. The powers enumerated in this Code section are cumulative of and in addition to each other and other powers granted elsewhere in this chapter and no such power limits or restricts any other power of the authority. Without limiting the generality of the foregoing, the powers of the authority shall include the powers:

- (1) To bring and defend actions;
- (2) To adopt and amend a corporate seal;

(3) To make and execute contracts, agreements, and other instruments necessary, proper, or convenient to exercise the powers of the authority and to further the public purpose for which the authority is created, including, but not limited to, contracts for construction of projects, leases of projects, operation of projects, sale of projects, agreements for loans to finance projects, and contracts with respect to the use of projects, including negotiated contracts with air carriers for the use of projects;

(4) To plan, survey, subdivide, improve, administer, construct, erect, acquire, own, repair, remodel, maintain, add to, extend, improve, equip, operate, and manage projects, as defined in Code Section 6-4-3, to be located on property owned or leased by the authority; the cost of any such project shall be paid from its income, from any grant from the United States government or any agency or instrumentality thereof, or from any grant from this state;

(5) In connection with any project, to acquire by purchase, lease, condemnation, or otherwise and to hold, lease, and dispose of real and personal property of every kind and character or any interest therein in furtherance of its corporate purposes;

(6) In connection with any project, to acquire in its own name by purchase, on such terms and conditions and in such manner as it may deem proper or by condemnation in accordance with any and all existing laws applicable to the condemnation of property for public use, real property or rights or easements therein or franchises necessary or convenient for its corporate purposes; and to use the same so long as its corporate existence shall continue and to lease or make contracts with respect to the use of or to dispose of the same in any manner it deems to the best advantage of the authority, the authority being under no obligation to accept and pay for any property condemned under this chapter or under Code Section 6-2-20 except from the funds provided under the authority of this chapter; and, in any proceedings to condemn, such order may be made by the court having jurisdiction of the action or proceedings as may be just to the authority and to the owners of the property to be condemned; and no property shall be acquired under this chapter upon which any lien or other encumbrance exists unless at the time such property is so acquired a sufficient sum of money be deposited in trust to pay and redeem such lien or encumbrance in full;

(7) To adopt regulations and fix, alter, charge, negotiate, and collect fares, rates, fees, tolls, and other charges for the use of such projects; fix penalties for the violation of said regulations; and establish liens to enforce payment of said charges, fees, and tolls, subject to existing contracts; to make such contracts, leases, or conveyances as the legitimate and necessary purposes of this chapter shall require, including, but not limited to, contracts with private parties for the operation or lease or

assignment to private parties for operation, space, area, improvements, and equipment on such projects, provided in each case that in so doing the public is not deprived of its rightful, equal, and uniform use thereof;

(8) To finance, by loan, grant, lease, or otherwise, and to construct, erect, assemble, purchase, acquire, own, repair, remodel, renovate, rehabilitate, modify, maintain, extend, improve, install, sell, equip, expand, add to, operate, or manage projects and to pay the cost of any project from the proceeds of revenue bonds, notes, or other obligations of the authority or any other funds of the authority or from any contributions or loans by persons, corporations, partnerships, limited or general, or other entities, all of which the authority is empowered to receive, accept, and use;

(9) To borrow money to further or to carry out its public purpose and to execute revenue bonds, notes, other obligations, leases, trust indentures, trust agreements, agreements for the sale of its revenue bonds, notes, or other obligations, loan agreements, mortgages, deeds to secure debt, trust deeds, security agreements, assignments, and such other agreements or instruments as may be necessary or desirable, in the judgment of the authority, to evidence and to provide security for such borrowing;

(10) To accept loans and grants, either or both, of money, materials, or property of any kind from the United States government or the State of Georgia or any political subdivision, authority, agency, or instrumentality of either of them, upon such terms and conditions as the United States government or the State of Georgia or such political subdivision, authority, agency, or instrumentality of either of them shall impose;

(11) To hold, use, administer, and expend such sum or sums as may hereafter be received as income or gifts or as may be appropriated by authority of the General Assembly for any of the purposes of the authority;

(12) To issue revenue bonds, notes, or other obligations of the authority and use the proceeds thereof for the purpose of paying or loaning the proceeds thereof to pay all or any part of the cost of any project and otherwise to further or carry out the public purpose of the authority and to pay all costs of the authority incident to, or necessary and appropriate to, furthering or carrying out such purpose;

(13) To make application directly or indirectly to any federal, state, county, or municipal government or agency or to any other source, public or private, for loans, grants, guarantees, or other financial assistance in furtherance of the authority's public purposes and to accept and use the same upon such terms and conditions as are prescribed by such federal, state, county, or municipal government or agency or other source;

(14) To enter into agreements with the federal government or any agency or corporation thereof to use the facilities of the federal govern-

ment or agency or corporation thereof in order to further or carry out the public purposes of the authority;

(15) To extend credit or make loans to any person, corporation, partnership, limited or general, or other entity for the costs of any project, which credit or loans may be evidenced or secured by loan agreements, notes, mortgages, deeds to secure debt, trust deeds, security agreements, assignments, or other instruments or by rentals, revenues, fees, or charges, upon such terms and conditions as the authority shall determine to be reasonable in connection with such extension of credit or loans, including provision for the establishment and maintenance of reserve funds, and, in the exercise of powers granted in connection with any project, the authority shall have the right and power to require the inclusion in any such loan agreement, note, mortgage, deed to secure debt, trust deed, security agreement, assignment, or other instrument of such provisions or requirements for guarantee of any obligations, insurance, construction, use, operation, maintenance, and financing of a project and such other terms and conditions as the authority may deem necessary or desirable;

(16) As security for repayment of any revenue bonds, notes, or other obligations of the authority, to pledge, mortgage, convey, assign, hypothecate, or otherwise encumber any property of the authority, including, but not limited to, real property, fixtures, personal property, and revenues or other funds; and to execute any lease, trust indenture, trust agreement, agreement for the sale of the authority's revenue bonds, notes, or other obligations, loan agreement, mortgage, deed to secure debt, trust deed, security agreement, assignment, or other agreement or instrument as may be necessary or desirable in the judgment of the authority to secure any such revenue bonds, notes, or other obligations, which instruments or agreements may provide for foreclosure or forced sale of any property of the authority upon default in any obligation of the authority, either in payment of principal, premium, if any, or interest or in the performance of any term or condition contained in any such agreement or instrument. The State of Georgia on behalf of itself and each county, municipal corporation, political subdivision, or taxing district therein waives any right the state or such county, municipal corporation, political subdivision, or taxing jurisdiction may have to prevent the forced sale or foreclosure of any property of the authority upon such default and agrees that any agreement or instrument encumbering such property may be foreclosed in accordance with law and terms thereof;

(17) To receive and use the proceeds of any tax levied by the State of Georgia or any county or municipality thereof to pay the costs of any project or for any other purpose for which the authority may use its own funds pursuant to this chapter;

(18) To receive and administer gifts, grants, and devises of money and property of any kind and to administer trusts;

(19) To use any real property, personal property, or fixtures or any interest therein; to rent or lease such property to or from others or make contracts with respect to the use thereof; or to sell, lease, exchange, transfer, assign, pledge, or otherwise dispose of or grant options for any such property in any manner as it deems to be to the best advantage of the authority and the public purpose thereof;

(20) To acquire, accept, or retain equitable interests, security interests, or other interests in any real property, personal property, or fixtures by loan agreement, note, mortgage, deed to secure debt, trust deed, security agreement, assignment, pledge, conveyance, contract, lien, loan agreement, or other consensual transfer in order to secure the repayment of any moneys loaned or credit extended by the authority;

(21) To appoint, select, and employ officers, agents, and employees, including engineers, surveyors, architects, urban or city planners, construction experts, fiscal agents, attorneys, and others and to fix their compensation and pay their expenses;

(22) To make, contract for, or otherwise cause to be made long-range plans or proposals for projects authorized in Code Section 6-4-2 within the service area, in cooperation with those political subdivisions within which such projects are located or are proposed to be located;

(23) By or through its authorized agents or employees, to enter upon any lands, waters, and premises in the state for the purpose of making surveys, soundings, drillings, and examinations as the authority may deem necessary or convenient for the purposes of this chapter; and such entry shall not be deemed a trespass. The authority shall, however, make reimbursement for any actual damages resulting from such activities;

(24) To make reasonable regulations for installation, construction, maintenance, repairs, renewal, and relocation of pipes, mains, conduits, cables, wires, towers, poles, and other equipment and appliances of any public utility in, on, along, over, or under any project;

(25) To exercise any power granted by laws of the State of Georgia to public or private corporations which is not in conflict with the Constitution and laws of Georgia; and

(26) To do all things necessary, proper, or convenient to carry out the powers conferred by this chapter, including the adoption of rules and regulations. (Code 1981, § 6-4-7, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-8. (For effective date, see note) Requirements for issuance of revenue bonds, notes, or other obligations.

Revenue bonds, notes, or other obligations issued by an authority shall be paid solely from the property, including, but not limited to, real property, fixtures, personal property, revenues, or other funds pledged, mortgaged, conveyed, assigned, hypothecated, or otherwise encumbered to secure or to pay such bonds, notes, or other obligations. All revenue bonds, notes, and other obligations shall be authorized by resolution of the authority, adopted by a majority vote of the members of the authority at a regular or special meeting. Such revenue bonds, notes, or other obligations shall bear such date or dates, shall mature at such time or times not more than 40 years from their respective dates, shall bear interest at such rate or rates, which may be fixed or may fluctuate or otherwise change from time to time, shall be subject to redemption on such terms, and shall contain such other terms, provisions, covenants, assignments, and conditions as the resolution authorizing the issuance of such bonds, notes, or other obligations may permit or provide. The terms, provisions, covenants, assignments, and conditions contained in or provided or permitted by any resolution of the authority authorizing the issuance of such revenue bonds, notes, or other obligations shall bind the members of the authority then in office and their successors. The authority shall have the power from time to time and whenever it deems refunding expedient to refund any bonds by the issuance of new bonds, whether the bonds to be refunded have or have not matured, and may issue partly to refund bonds then outstanding and partly for any other purpose permitted under this chapter. The refunding bonds may be exchanged for the bonds to be refunded with such cash adjustments as may be agreed upon or may be sold and the proceeds applied to the purchase or redemption of the bonds to be refunded. There shall be no limitation upon the amount of revenue bonds, notes, or other obligations which the authority may issue. Any limitations with respect to interest rates or any maximum interest rate or rates found in the usury laws of the State of Georgia, or any other laws of the State of Georgia, shall not apply to revenue bonds, notes, or other obligations of the authority. (Code 1981, § 6-4-8, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-9. (For effective date, see note) Additional provisions governing issuance of bonds, notes, or other obligations.

(a) Subject to the limitations and procedures provided by this Code section, the agreements or instruments executed by the authority may contain such provisions not inconsistent with law as shall be determined by the members of the authority.

(b) The proceeds derived from the sale of all bonds, notes, and other obligations issued by the authority shall be held and used for the ultimate purpose of paying, directly or indirectly as permitted in this chapter, all or part of the cost of any project or for the purpose of refunding any bonds, notes, or other obligations issued in accordance with the provisions of this chapter.

(c) Issuance by the authority of one or more series of bonds, notes, or other obligations for one or more purposes shall not preclude it from issuing other bonds, notes, or other obligations in connection with the same project or with any other projects, but the proceeding wherein any subsequent bonds, notes, or other obligations shall be issued shall recognize and protect any prior loan agreement, mortgage, deed to secure debt, trust deed, security agreement, or other agreement or instrument made for any prior issue of bonds, notes, or other obligations unless in the resolution authorizing such prior issue the right is expressly reserved to the authority to issue subsequent bonds, notes, or other obligations on a parity with such prior issue.

(d) The authority shall have the power and is authorized, whenever bonds of the authority shall have been validated as provided in this chapter, to issue from time to time its notes in anticipation of such bonds as validated and to renew from time to time any such notes by the issuance of new notes, whether the notes to be renewed have or have not matured. The authority may issue such bond anticipation notes only to provide funds which otherwise would be provided by the issuance of the bonds as validated. Such notes may be authorized, sold, executed, and delivered in the same manner as bonds. As with its bonds, the authority may sell such notes at public or private sale. Any resolution or resolutions authorizing notes of the authority or any issue thereof may contain any provisions which the authority is authorized to include in any resolution or resolutions authorizing bonds of the authority or any issue thereof and which the authority is authorized to include in any bonds. Validations of such bonds shall be a condition precedent to the issuance of such notes, but it shall not be required that such notes be judicially validated. Bond anticipation notes shall not be issued in an amount exceeding the par value of the bonds in anticipation of which they are to be issued.

(e) All bonds issued by the authority under this chapter shall be issued and validated under and in accordance with Article 3 of Chapter 82 of Title 36, the "Revenue Bond Law," as heretofore and hereafter amended, except as provided in this chapter, provided that notes and other obligations of the authority may be, but shall not be required to be, so validated.

(f) The authority shall determine the form of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest thereof, which may be at any bank or trust company within or

outside the state. The bonds may be issued in coupon or registered form or both, as the authority may determine, and provision may be made for the registration of any coupon bond as to principal alone and also as to both principal and interest.

(g) All bonds shall be signed by the chairman of the authority, and the official seal of the authority shall be affixed thereto and attested by the secretary of the authority, and any coupons attached thereto shall bear the signature or facsimile signature of the chairman of the authority. Any coupon may bear the facsimile signature of such person, and any bond may be signed, sealed, and attested on behalf of the authority by such person as at the actual time of the execution of such bonds shall be duly authorized to hold the proper office although at the date of such bonds such person may not have been so authorized or shall not have held such office. In case any officer whose signature shall appear on any bonds or whose facsimile signature shall appear on any coupon shall cease to be such officer before the delivery of such bonds, such signature shall nevertheless be valid and sufficient for all purposes the same as if such officer had remained in office until such delivery.

(h) In lieu of specifying the rate or rates of interest which bonds to be issued by the authority are to bear, the notice to the district attorney or the Attorney General, the notice to the public of the time, place, and date of the validation hearing, and the petition and complaint for validation may state that the bonds when issued will bear interest at a rate not exceeding a maximum per annum rate of interest, which may be fixed or may fluctuate or otherwise change from time to time, specified in such notices and petition and complaint or that, in the event the bonds are to bear different rates of interest for different maturity dates, that none of such rates will exceed the maximum rate which may be fixed or may fluctuate or otherwise change from time to time so specified; provided, however, that nothing contained in this subsection shall be construed as prohibiting or restricting the right of the authority to sell such bonds at a discount, even if in so doing the effective interest cost resulting therefrom would exceed the maximum per annum interest rates specified in such notices and in the petition and complaint.

(i) The authority may also provide for the replacement of any bond which becomes mutilated or which is destroyed or lost.

(j) The issuance of any bond, revenue bond, note, or other obligation or the incurring of any debt by the authority must, prior to such occurrence, be approved by the Georgia State Financing and Investment Commission established by Article VII, Section IV, Paragraph VII of the Constitution of the State of Georgia of 1983 or its successor. (Code 1981, § 6-4-9, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-10. (For effective date, see note) Development of air transportation projects.

The implementation of new air transportation projects that are planned to accommodate 14 C.F.R. Part 121 aircraft operations within the State of Georgia develops and promotes for the public good and general welfare, trade, commerce, tourism, industry, and employment opportunities and promotes the general welfare of the state by creating a favorable climate for the location of new industry, trade, and commerce and the development of existing industry, trade, and commerce within the State of Georgia. It is therefore in the public interest and is vital to the public welfare of the people of Georgia and it is declared to be the public purpose of this chapter to so develop such air transportation projects within this state. No bonds, notes, or other obligations, except refunding bonds, shall be issued by the authority pursuant to this chapter unless its membership adopts a resolution finding that the project for which such bonds, notes, or other obligations are to be issued will promote the foregoing objectives. (Code 1981, § 6-4-10, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-11. (For effective date, see note) Liberal construction of chapter.

The provisions of this chapter shall be liberally construed to effect its stated purpose. The offer, sale, or issuance of bonds, notes, or other obligations by the authority shall not be subject to regulation under the laws of the State of Georgia regulating the sale of securities, as heretofore and hereafter amended. No notice, proceeding, or publication except those required by this chapter shall be necessary to the performance of any act authorized by this chapter nor shall any such act be subject to referendum. (Code 1981, § 6-4-11, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-12. (For effective date, see note) Obligations or indebtedness not to constitute indebtedness of state or political subdivisions.

No bonds, notes, or other obligations of and no indebtedness incurred by the authority shall constitute an indebtedness or obligation of the State of Georgia or any county, municipal corporation, or political subdivision thereof nor shall any act of the authority in any manner constitute or result in the creation of an indebtedness of the state or any such county, municipal corporation, or political subdivision. No holder or holders of any such

bonds, notes, or other obligations shall ever have the right to compel any exercise of the taxing power of the state or any county, municipal corporation, or political subdivision thereof nor to enforce the payment thereof against the state or any such county, municipal corporation, or political subdivision; and all such bonds shall contain recitals on their face covering substantially the foregoing provisions of this Code section. (Code 1981, § 6-4-12, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-13. (For effective date, see note) Tax exemption.

It is found, determined, and declared that the creation of the Georgia Airport Development Authority and the carrying out of its corporate purposes are in all respects for the benefit of the people of this state and constitute a public purpose and that the authority will be performing an essential governmental function in the exercise of the power conferred upon it by this chapter. The authority shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession, or supervision or upon its activities in the operation or maintenance of the facilities erected, maintained, or acquired by it nor upon any fees, rentals, or other charges for the use of such facilities or other income received by the authority. The state covenants with the holders from time to time of the bonds, notes, and other obligations issued under this chapter that the authority shall not be required to pay any taxes or assessments imposed by the state or any of its counties, municipal corporations, political subdivisions, or taxing districts on any property acquired by the authority or under its jurisdiction, control, possession, or supervision or leased by it to others or upon its activities in the operation or maintenance of any such property or on any income derived by the authority in the form of fees, recording fees, rentals, charges, purchase price, installments, or otherwise, and that the bonds, notes, and other obligations of the authority, their transfer, and the income therefrom shall at all times be exempt from taxation within the state. (Code 1981, § 6-4-13, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-14. (For effective date, see note) Police powers.

The authority is empowered to exercise such of the police powers of the state as may be necessary to maintain peace and order and to enforce any and all restrictions upon its properties and facilities, to the extent that such is lawful under the laws of the United States and this state; however, the authority may delegate the exercise of this function for a time or perma-

nently to the state or to the county in which its projects are located. (Code 1981, § 6-4-14, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-15. (For effective date, see note) Other authorities unaffected by provisions of chapter.

This chapter shall not affect any other authority now or hereafter existing under general or local constitutional amendment or general or local law. (Code 1981, § 6-4-15, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

6-4-16. (For effective date, see note) Venue and jurisdiction of actions.

Any action to protect or enforce any rights under this chapter and any action pertaining to validation of any bonds issued under this chapter brought in the courts of this state shall be brought in the Superior Court of Fulton County, which shall have exclusive jurisdiction of such actions. (Code 1981, § 6-4-16, enacted by Ga. L. 1992, p. 1615, § 1.)

Delayed effective date. — For effective date, see note at beginning of chapter.

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